

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THYSSENKRUPP FABCO CORPORATION,

Plaintiff,

v.

CIVIL ACTION
NO. 04-74331

HEIDTMAN STEEL PRODUCTS, INC.

Defendant.

MOTION FOR PRELIMINARY INJUNCTION
BEFORE THE HONORABLE NANCY G. EDMUNDS
United States District Judge
226 Theodore Levin U.S. Courthouse
231 Lafayette Boulevard West
Detroit, Michigan
November 29, 2004

APPEARANCES:

MR. DANIEL N. SHARKEY, ESQ.,
MR. ERIC M. MATHIS, ESQ.,

In behalf of Plaintiff.

MR. JOHN M. CAREY, ESQ.,
MS. PATRICE AREND, ESQ.
MR. ROBERT BOHMER, ESQ.

In behalf of Defendant.

- - -

Suzanne Jacques, CSR, RMR
Official Court Reporter - U.S. District Court
313-234-5155

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1 Detroit, Michigan

2 November 29, 2004

3 10:10 a.m.

4 - - -

5 LAW CLERK: Court calls Thyssenkrupp Fabco
6 Corporation versus Heidtman Steel, 04-74331. Counsel,
7 please state your appearances for the record.

8 MR. SHARKEY: Dan Sharkey on behalf of
9 plaintiff.

10 MR. MATHIS: Eric Mathis on behalf of plaintiff.

11 MR. CAREY: John Carey for Heidtman Steel.

12 MS. AREND: Patrice Arend for Heidtman Steel.

13 MR. BOHMER: And Robert Bohmer on behalf of
14 Heidtman Steel, Your Honor.

15 THE COURT: All right. I take it from the fact
16 that everybody's here that you didn't settle this.

17 MR. BOHMER: That's correct, Your Honor.

18 MR. SHARKEY: That's right, Your Honor. The
19 parties and I -- Miss Arend can correct me -- but the
20 parties have had significant discussions. I think they had
21 a two-hour meeting either Monday or Tuesday of last week,
22 and without going into them, it's too big a gap to bridge,
23 they just couldn't do it. They really did bang their heads
24 together, but it was not to be. And I know you urged us at
25 the TRO hearing back on the 9th, guys, get together, but it

1 didn't happen. I think I can say for our side and for
2 theirs it wasn't for lack of trying.

3 MR. BOHMER: That's correct, Your Honor.

4 THE COURT: Okay. I'm prepared to go forward
5 with this as soon as I grab a legal pad.

6 Do you wish to make opening statements?

7 MR. SHARKEY: Yes, Your Honor.

8 THE COURT: All right. Mr. Sharkey?

9 (10:15 a.m.)

10 MR. SHARKEY: Your Honor, I'm going to very
11 quickly review the facts because the Court's already had a
12 TRO hearing and knows the essence of the facts. But I got
13 to say, I've never seen briefs -- I feel like the parties
14 are talking past each other like no other supply dispute
15 I've had. We're saying one thing -- it's not we're saying X
16 and they're saying it's not X, it's we're saying X and
17 they're saying Y on the legal issues. But very briefly, as
18 you know, my client, Fabco, buys steel coils from Heidtman,
19 the defendant.

20 Our position is we have a contract, fixed price,
21 .3585 per pound. We take their steel, we make a beam, we
22 put it in, we make a beam and we ship that beam every day to
23 Nissan's facility in Tennessee. They make cars, namely, the
24 SUV's the X-Terra and the Pathfinder. You know all about
25 just-in-time inventory, sole sources, all those kinds of

1 things; the production part of the approval process, the
2 fact that even if we could find a new supplier today, we'd
3 still have to spend months testing it and getting it
4 approved.

5 So the parties, throughout the automotive
6 industry, the parties really are wedded to each other in a
7 lot of ways which makes divorces extremely painful. Here we
8 are.

9 There's one thing I got to correct. I told you
10 something that was wrong on November 9. I told you the
11 price was .3585 all the way going back to when the contract
12 started in March of '03. That was not right. Mr. Tessier,
13 who is in court, he's the only witness we'll call today, he
14 called me last Friday -- or excuse me, sent me an email I
15 guess around 5:30 on the 19th, and said, Dan, I looked at
16 this stuff, I just found out that we actually had, during
17 the prototype phase, when we didn't really have any volume,
18 we're just getting onesies and twosies parts and testing
19 them, the price was .297. It was lower, and we did give
20 them a price increase to .3585 middle of April, we made it
21 effective April first.

22 So Mr. Tessier sent this email Friday, I read it
23 Monday morning, talked to him. I called the other side and
24 said, guys, I made a misstatement to the Court and I wanted
25 to make you aware of it right way. I don't think it changes

1 the legal analysis but I want to kind of get that out. I
2 said something that was wrong. I said the price was always
3 .3585 going back the last 19 months. Not true. The price
4 was .297 for about a year, March of '03 to April of '04.
5 The part wasn't really in production, it was just in
6 prototype and testing. Then it went to .3585. Remember
7 they're asking for .5185 I believe here.

8 The only issue here today is sort of an interim
9 issue. What happens between now and the point where we can
10 really hash this out with deposition and discovery and cross
11 motions for summary judgment and all those kind of things.
12 It's a straight interim issue. I'm not going to go through
13 all the factors, because the court has issued more
14 preliminary injunctions and denied more than I could shake a
15 stick at. But the point is that the Sixth Circuit said as
16 recently as three months ago, the point of preliminary
17 injunction is to try to preserve the status quo. That was
18 the Edward Rose case I cited in my brief. U.S. Supreme
19 Court said it's to preserve the relative positions of the
20 parties until a trial on the merits can be held.

21 We understand we have a burden, we're the ones
22 coming in here asking for an injunction, and that is
23 extraordinary relief, and we take that burden gladly. The
24 point here is what's going to be the price between now and
25 the time when we can hash this out on the merits. I think

1 the Court got our statement on that Rule 65 issue that
2 they -- we wanted to consolidate this with a trial on the
3 merits, they didn't want to, so we're going to have to keep
4 going on this case.

5 The essence of our position, we're insisting
6 you've got to live up to this 35 cents, guys. That's what
7 our contract says, you've got to keep shipping.

8 The UCC authorizes specific performance, you
9 know all that. It's particularly in the automotive
10 industry, particularly in requirements contracts, that's
11 what we have here, there's ample basis for it. The Court's
12 already read the brief, it's already ruled on a TRO. We've
13 cited dozens of cases saying it's not commercial
14 impracticability if you have an increase in cost. So I'm
15 skipping through all that on a summary basis here, but the
16 point is, case after case after case has said just because
17 you have an increase in your raw material cost doesn't mean
18 you have a right to charge a higher price. You have to
19 stick to your contract price. That's not just a national
20 thing, and I cited all those national cases going back to
21 OPEC in the 1970's and the higher prices there, but Judge
22 Cleland said that a couple weeks ago in the Intertech case.
23 On the steel beam case, the now Judge Goldsmith, formerly
24 Mark Goldsmith, said that, they actually did consolidate,
25 trial on the merits. He said sorry, guys, I understand you

1 have a business concern here, you have higher prices, and
2 I'm not unsympathetic to that, but these were fixed price
3 contracts. That's just not significant on a legal level.
4 It's not a force majeure, they haven't even made that
5 argument, so I'll just skip through that.

6 I'm trying to go too fast here.

7 THE COURT: I've got nothing but time.

8 MR. SHARKEY: Okay. A key point that needs to
9 be made here is even if the Court were to find on the
10 merits, you know what, Fabco, you're just dead wrong, these
11 guys can get out of this contract, we still have the ability
12 to, for reasonable time period to go cover under 2309 of the
13 UCC. So no what matter what happens, even if you rule
14 completely in their favor, our position is we got to have at
15 least five to six months to try to find another supplier for
16 this steel. Mr. Tessier is going to take the stand and talk
17 about how hard it was to get the steel on line, how Nissan
18 could not get to it's normal U.S. Steel its huge
19 institutional buyers.

20 Nowhere in any -- they filed a ton of briefs in
21 this case. Nowhere anywhere did they say we ever agreed to
22 pay .5185. There's just no assent to that at all. They
23 don't even allege it, nor did we.

24 The Court expressed concern on the irreparable
25 harm element at the TRO hearing. That was the one thing

1 that the Court picked up. I've cited several cases in our
2 reply briefs and in our principal briefs where Judge Cohn in
3 that 1990 Kelsey-Hayes case said a supplier's failure to
4 make scheduled shipments can have immediate dramatic
5 consequences, and we recognize that, and we argued back and
6 forth about what the Kelsey-Hayes case meant.

7 So I'd leave that point alone other than to say
8 it heavily supports our side. It's not just payment under
9 duress. The Court has said that's just not good enough
10 sometimes. Sometimes harm truly is irreparable. The
11 balance of harms, I think you just take a couple steps down
12 each path here, and one path, that's the only issue, are you
13 going to issue an injunction today or are you not. You take
14 a couple steps down the path of you issue an injunction,
15 what happens? They got to keep shipping and we've got to
16 keep paying them .3585, what we say is the contract price.
17 That's what happens. Maybe they'll not make as much money,
18 maybe they'll lose some money. I don't really know what
19 their financials are. Clearly they're not going to do as
20 well as if they had a 17-cent increase, which is what they
21 want. But that is a risk they took when they agreed to ship
22 under this contract. That's a risk that they assumed. I
23 mean, they're implicitly speculating on the commodities
24 market when they bid a contract like this. If steel prices
25 go way down, they're going to pocket it; if they go up, they

1 may lose money or make very little money.

2 Any harm they experience is the business risk
3 they took. So that's a couple steps down the injunction
4 path. A couple steps down the no injunction path, if Fabco
5 loses today, we've got to go back to our little conference
6 room across the street and say what are we going to do,
7 guys? Are we going to shut down Nissan? Or do we have to
8 pay this thing under duress, pay all this money? That's the
9 very choice -- I mean, that was the choice that would have
10 had to be made if Fabco never filed this lawsuit.

11 They filed -- I got their motion in limine, they
12 faxed it to me Wednesday morning, my secretary took a day
13 off, day before Thanksgiving, I just read it this morning.
14 Well, one of the things they say is, well, this Nissan
15 stuff, it's all speculative.

16 Mr. Tessier is going to tell you today Nissan
17 has been shut down this year for hours at a time, and our
18 share, our small share of a two hour shut down was \$200,000.
19 It's very real, it happens. You can imagine how many parts
20 go into a car, I mean, hundreds and hundreds. You get one
21 little plastic piece or one little screw or one little hinge
22 that's not made, and that can shut down a line. It happens
23 quite a bit, and when that does, it is extraordinarily
24 expensive. And if you've ever had GM breathing down your
25 neck on one of their lines, or one of the OEM's, it's an

1 experience like no other. As Mr. Tessier told me this
2 morning in conference, his boss has told him you can do that
3 one time, and that's the last time you'll ever do it.

4 So those are the choices; injunction, no
5 injunction. We submit that the harm is much greater if you
6 don't issue an injunction here.

7 The public interest, obviously, keeping plants
8 running, keep people employed, all the suppliers that feed
9 into these plants, we think it's in the interest to keep
10 those plants running.

11 The key thing we've got here is we've got this
12 contract started in February of '03, and we're just about
13 halfway into it. It's supposed to end in September of '06.
14 That's three and-a-half years, so 42 months or something,
15 and we're about 21, 22 months into that. Now, the first
16 year or so of that was just testing. Now we've been in
17 production for I believe four or five months. Actual
18 volume, they are shipping to us every week. Usually on
19 Tuesdays, we get a big shipment of coil, we turn it into the
20 beam, we ship it every single day to Nissan.

21 So it's just not speculative. So that's the,
22 that's the essence of our position, that's why the Court
23 ought to issue an injunction.

24 What has the other side said in response? In
25 their first reply brief, they brought out the Corbin on

1 Contracts. There was no contract, there was no mutual
2 obligation, Fabco waived its rights. It's not supported by
3 consideration. Heidtman never accepted the contract. Those
4 things, frankly, I can't even fathom. We issued, we meaning
5 the buyer, and any automotive buyer, issues purchase orders
6 and it's very rare that the other side actually sits down
7 and says, great, we accept and we'll fax it back to you.
8 They start shipping. They get the PO, they start shipping,
9 and a contract is formed. That is a contract. And they
10 never, they don't have to execute an acceptance to do that,
11 and by shipping, they indicate that they are accepting the
12 contract prices, and that's what we have here.

13 In their latest brief, they said quite a few
14 things. What they said is, you know, they throw all these
15 purchase orders at you, Your Honor, and they throw all these
16 prices and all these parts, and they just keep throwing
17 stuff and throwing stuff and charging different things, and
18 then at the end they say, you know, it's just a jumble of
19 different PO's and different prices, and the prices were all
20 always changing, and what's the darn difference? Because
21 this is the only course of dealing between the parties.

22 I have to go back and give ourselves a little
23 gold star on our lapel because -- Fabco -- because this
24 company, like some others, was pretty accommodating. And
25 Mr. Tessier will tell you when he takes the stand that it

1 was looking to split losses with the suppliers for long-term
2 relationships to keep them in tact. But Heidtman, that
3 wasn't good enough for them. They wanted the whole loaf.
4 And they wanted the full increase, and wanted this increase,
5 and they got them in some places.

6 And Mr. Tessier is going to tell you, you know,
7 my hand is forced, I can't shut down Nissan, I did give them
8 price increases on some of these products because I felt I
9 had to, but it kept going and going and going and going.
10 And as he'll tell you, he even forgot that he had issued an
11 increase from .297 cents to .3585 back in April. So even on
12 this part, we gave a higher price. We could have stood on
13 our legal principles and said we want .297 until
14 September 25, 2006. They didn't. They gave, I guess it's
15 about a nine cent increase or so. That equates, I believe
16 it's 7 million pounds a year of product is what the contract
17 calls for. It's a lot to give up in terms of dollars. But
18 production is king, and Mr. Tessier will tell you he cannot
19 shut down Nissan. I mean, it just cannot happen.

20 So what they say now --

21 THE COURT: Well, and let's -- I mean, you keep
22 talking about shutting down Nissan. That's not going to
23 happen. I mean, what's going to happen if I don't issue the
24 injunction is that you'll pay the higher price and then
25 you'll take the loss instead of Heidtman.

1 MR. SHARKEY: That's a decision that would have
2 to be made, and you're probably right, Your Honor. I mean,
3 if the choice is between shutting them down and paying them
4 a higher price, that's probably the choice they would have
5 to make.

6 THE COURT: It's really just the issue of who
7 absorbs the additional cost, isn't it?

8 MR. SHARKEY: I think it's -- no, I don't think
9 it's quite that simple. You're right, if they decide that
10 they're going to -- we can't shut them down, guys, we've got
11 to pay them under protest, then that's true, you're right,
12 then it's true. But they've got to make that decision first
13 because what they can't do is tell Nissan, go look to
14 Heidtman, guys, and Nissan will say, no, you're -- what they
15 always say, every car maker, no, you're our contract
16 company, control your supply chain, I don't care what you
17 have to do, I want my beams because I got to build my cars.

18 THE COURT: Right.

19 MR. SHARKEY: I follow you, Your Honor, and
20 if --

21 THE COURT: I just don't believe that you're
22 going to walk away from that. I mean, Nissan is too
23 important a customer, it's basically your life line. I just
24 really see this as a pretty straight contract question:
25 Who, under the terms of this contract, absorbs increase in

1 the cost of the steel?

2 MR. SHARKEY: Yes, ma'am. And of course our
3 position is they ought to because they bet on it. But I, I
4 agree with you, you're right. As soon as we walk out of
5 this door, if Mr. Tessier picks up the phone and calls the
6 CEO of Fabco and says, guys, court said no, what are we
7 going to do? They probably will say, we can't shut them
8 down guys, we gotta pay 'em the higher price. I'm just
9 saying it's just one little hurdle to get there. And the
10 decision has to be made, and it's not mine as their outside
11 lawyer. That's all. I follow where you're going which is
12 who took the risk, who's got to pay the 17 cents, or take
13 the loss because of the higher steel price.

14 Then they call this thing spot buys. This is
15 unreal to me. They say you know what these were? These
16 were spot buys. You were saying we want this price, and
17 it's going to change on this product, and they keep throwing
18 things at you.

19 These are not spot buys. We need a shipment of
20 that steel coil every single week for the next two years.
21 It's not a spot buy all. I think the weekly invoices are
22 somewhere around \$20,000, or something like that. It's a
23 big contract and it's a requirements contract. We need it
24 every single week. It is the antithesis of a spot buy, Your
25 Honor.

1 In a very limited sense, when we were just
2 buying a couple prototype parts without any significant
3 volume, you could say, yeah, they were spot buys, send us
4 50, we're going to do some engineering tests on them. But
5 now they've been in production. For months, it is not a
6 spot buy at all, quite the opposite.

7 They raise a lot of issues about the money. You
8 owe us money, you're behind on this, behind on that. Every
9 one of those money issues is a price dispute in a different
10 mask, and I'll explain to you why, just by looking at two
11 pages of an exhibit. I don't know if the Court has the
12 binder of exhibits in front of it.

13 THE COURT: I do.

14 MR. SHARKEY: But if you look at Exhibit 545,
15 Your Honor, this is their exhibit, and if you flip to the
16 third page, ma'am, the third page of 545 should be a check
17 from Fabco to Heidtman for \$30,000 and change.

18 THE COURT: Yes.

19 MR. SHARKEY: Okay. Now, if you look at the
20 next page, the next page is invoice, it's in the top
21 right-hand corner, 541269, and then you look down at the
22 weight, which is the second from the right column there, the
23 weight is 42,540, and then they say -- this is their invoice
24 to us, Heidtman. They're saying pay us the 44.35 plus the
25 7.50, guys, which equates to 51.85. So at the bottom there

1 they're saying pay us \$22,000 and change. You flip back to
2 the page I had you on a minute ago, Your Honor, the page
3 before.

4 THE COURT: They're paying 44.35 plus 7.50?

5 MR. SHARKEY: Yes, per pound, ma'am. Which is
6 51.85 together.

7 You add, so you take those two together and it
8 totals to about 22,000 and some. If you flip back to the
9 page I was just on, and you look at that same invoice, which
10 is 541269, this is our check, the top line of the page
11 before, where we're paying that invoice, we paid \$15,250.59.
12 What that number represents is the weight, 42,540 times the
13 contract price, .3585. We're paying them what the contract
14 price is. What they're claiming is you guys are way behind,
15 you owe us a whole ton of money.

16 My point here is, if you did the same thing with
17 the very next line, Your Honor, on the page after, you'd
18 see, 541802, and the weight was 43,440, they say pay us
19 22,000 and change, we paid them 15,000 and change. Both of
20 those numbers on the check, which is the third page of
21 Exhibit 545, equate to the actual weight they shipped us
22 times .3585.

23 So Mr. Boyce is here, he's the CFO of Fabco.
24 He'll take the stand. I don't want to call him on direct,
25 but if they make a big deal out of this thing, I'll call him

1 on the rebuttal to say that we've paid every dime they've
2 had coming and more.

3 What I'm trying to get to here in a couple
4 minutes, Your Honor, is our accounts receivable dispute is
5 really a pricing dispute by another name.

6 So they have -- and I just got to say, they've
7 thrown this big mess, but I almost feel like we're a victim
8 of our own niceguyness for -- that's not a good word, but we
9 could have kept this real clean and said here's our price,
10 no surcharges, no increases, none of the products, none of
11 the PO's, we're enforcing everything to the last dime and
12 we're going to fight you guys in court, we're going to take
13 it to the wall. There wouldn't be any email correspondence
14 with all this stuff back. They did agree to price
15 increases, and they ought not to be harangued for that, or
16 you can't say that's a course of dealing just because they
17 said, guys, the price was 29 cents, we're going to give you
18 35, we're giving you a break here, we're going to try to
19 keep working this out.

20 For them to come back and say, see, you gave us
21 six cents, it's a course of dealing, now you got to give us
22 17 more cents. I just don't think that's right, and that's
23 the essence of what they're saying, Your Honor.

24 THE COURT: Thank you. Mr. Carey.

25 (10:35 a.m.)

1 MR. CAREY: I won't argue it a great deal, Your
2 Honor, because I think the facts will be more interesting to
3 you, but if you have the exhibits available to you, I direct
4 your attention to Exhibit 532, Your Honor, because I think
5 the case is there in a nutshell.

6 Mr. Sharkey, in his last filing, and indeed the
7 last sentence of his memorandum said, This motion is Fabco's
8 request that Heidtman continue to ship one part, 63 by
9 54.875, on one contract, purchase order S100158, at one
10 price, .3585. They say that's his whole case, that's what
11 it's all about.

12 I'll represent to the Court that the first and
13 last time you'll see anything like a purchase order with
14 that part is here on 532, and Exhibit A to their complaint.
15 Exhibit A of their complaint is we never received it. The
16 purchase order we ever saw, Your Honor, is Exhibit 532.
17 It's the first time, and you can see, it says coil width
18 change only. That's when it became part number 6354 and
19 54.875. It's 63 because it's a gauge of 63, it's 54.875
20 because it's 54.875 wide, and that's how they would do their
21 part orders, Your Honor.

22 Sent to us on -- faxed to us on July 19 of this
23 year, and you will see that it is faxed back to them, if you
24 look at the top, by Heidtman, and says, Per email of
25 June 24.

1 THE COURT: I'm sorry, I'm not --

2 MR. CAREY: I'm sorry. Are you looking at 532?

3 THE COURT: I'm looking at 532.

4 MR. CAREY: Okay. This is their July 19, you'll
5 see in the upper right, see a July 19, '04 date, Your Honor?

6 THE COURT: Yes.

7 MR. CAREY: And you'll see it in handwriting
8 below, coil width change only.

9 THE COURT: Yes.

10 MR. CAREY: That's when they first ordered this
11 063 material which is the gauge, 063, by 54.8751. It's
12 54 inches --

13 THE COURT: Yes.

14 MR. CAREY: And that's the first time that
15 they've ever ordered this part number that Mr. Sharkey talks
16 about in the last sentence of his memorandum.

17 They send over a purchase order that says .3585.
18 We can see that, and Heidtman promptly returns it and says,
19 Per email of June 24 '04, the price is 47.85 100 weight
20 delivered. And if you look at the upper left, you'll see
21 it's to the attention of Tom Staddon, in the upper left of
22 this exhibit.

23 Tom Staddon, if you've had a chance to go
24 through the exhibits, is the person at Fabco that is, that
25 we deal with. Bob Millar is the person at Heidtman that

1 Fabco deals with, who -- the bulk of this case, Your Honor,
2 is really between the emails and the orders back and forth
3 between these two gentlemen.

4 I don't know how they can say that we ever
5 agreed to the, to sell to them at .3585 when we very
6 promptly return it and say no, here's your price. We'll go
7 through this, but I'm going to tell you, Your Honor, the
8 first item they talk about, which is this February 11, 2003,
9 this is what was represented to the Court at the temporary
10 restraining order. Nobody's seen it; you've never seen it,
11 I've never seen it, Mr. Sharkey doesn't exhibit it. Nobody
12 in the world knows what it ever said.

13 The last one --

14 THE COURT: Well, I have it, it's Exhibit A of
15 their complaint.

16 MR. CAREY: Not from '03, Your Honor. You have
17 something from September of this year, Your Honor. If you
18 look at that upper corner, you'll see status change,
19 9/25/04.

20 THE COURT: Yes, you're right.

21 MR. CAREY: Seen by us, Your Honor, for the
22 first time as an attachment to the complaint. And what
23 you'll see in between are status change orders sent in
24 various times. And one, for example, is this one of July 19
25 of this year.

1 If you look at all their prior versions, Your
2 Honor, they all reference some antecedent contract of
3 2/11/03. Nobody's ever seen it.

4 THE COURT: All right.

5 MR. CAREY: As I say, Your Honor, it may be of
6 more use, but I'm going to say -- hear the facts, but if you
7 go through the exhibits, you'll see here was the real course
8 of dealing between the parties. I think you've heard
9 enough. You know this market went nuts. We don't make the
10 steel, we buy it in this case from Steel Dynamics, we sell
11 it to Fabco which sells it on to Nissan. Everyone up and
12 down this line of distribution is in tears, except maybe the
13 mills, but they're paying scrap prices. I don't think
14 there's anybody happy in this entire system. I also suggest
15 to you there isn't any good guys or bad guys. There's just
16 people being squeezed, except maybe the scrap dealers.
17 Don't have anybody else that they have to worry about except
18 find supply.

19 We feel we're being, I don't want to use the
20 word gouged, but we've seen prices from the mills like
21 nothing we've ever seen before. Our customers have never
22 seen anything like it before. They go back to their end
23 users like Nissan, and everybody is shrieking up and down
24 the line.

25 The truth is that a year and-a-half ago, I'm

1 willing to believe there was probably a purchase order of
2 February 2003. Thereafter, we did some business. In
3 January, we told them the prices are going to start to rise.
4 There was no purchase order at .3585 at that time, nor was
5 there a part number, 63 54.875 at that time. Didn't exist.
6 At that time, they said you're going to shut down Nissan,
7 it's unique material, we can't do anything about it.

8 January of this year, Your Honor, they've had 11
9 months to qualify this material. This idea that somehow or
10 another that this is a crisis, this is an engineered crisis,
11 this is a contrivance, Your Honor. They've gone through the
12 year when they short paid invoices. We said if you don't
13 pay, we're going to stop shipping. They come current, then
14 we do it again, in January of this year, in June of this
15 year, in July of this year, on August 11 of this year, and
16 most recently at the end.

17 We should get on to the facts. I'll tell you,
18 Your Honor, the Exhibit 100 which is Attachment A to their
19 complaint, the document they say is the whole shooting
20 match, the one they hang their hat on, I'd invite the Court
21 to look at the bottom of that exhibit, and you'll see
22 that --

23 THE COURT: My exhibits start with 101.

24 MR. BOHMER1: 101, I'm sorry. That's that
25 September 25 document.

1 THE COURT: Yes.

2 MR. BOHMER1: If you look at the bottom, Your
3 Honor, you'll see that there's a fax number, and you'll see
4 that it was faxed by Fabco to Mr. Sharkey in the middle of
5 October, on October 14. On October 15, they quit paying
6 their invoices in full, and they ran into this courtroom on
7 November 5, on a Friday afternoon, and claim there was a
8 crisis.

9 I'm going to tell you exactly what's going on.
10 They have paid these prices through the year. Sometime in
11 October it's -- I don't know what the other documents were
12 they sent Butzel Long at that time, but this hasn't been a
13 course of dealing between them, Your Honor, this has been
14 for about a month and-a-half now. I think when you see
15 what's going on, you'll be surprised to see what the
16 difference is between the facts and what was presented to
17 you on November 9.

18 You've already had one concession that, well,
19 yeah, it really wasn't a fixed price contract, it changed.
20 It changed a lot. It's also not long term. What was
21 represented to you as a 2003 contract, Exhibit A, was
22 September when it was generated.

23 I don't think the Court has had a very honest or
24 fair representation of the facts. I hope you get through
25 these several exhibits, Your Honor.

1 THE COURT: Thank you, Mr. Carey.

2 Mr. Sharkey.

3 MR. SHARKEY: Yes, Your Honor. Plaintiff calls
4 Mr. Jeff Tessier to the stand.

5

6 **JEFF TESSIER,**

7 hereinbefore called as a witness, being first duly sworn
8 by the Court to tell the truth, the whole truth, and
9 nothing but the truth, was examined and testified upon
10 his oath as follows:

11 THE COURT: Before you start with Mr. Tessier,
12 let me tell you where my thinking is on this. As you know,
13 because I issued the TRO, I'm quite sympathetic to your
14 argument. If you can establish the fact there is a contract
15 dated February 11, '03. If the best that you have is this
16 status change of 9/23/04, I think you've got some problems.

17 MR. SHARKEY: Yes, ma'am. I'll go right to
18 that.

19 THE COURT: That's what I would do if I were
20 you.

21 (10:45 a.m.)

22 **DIRECT EXAMINATION**

23 BY MR. SHARKEY:

24 Q. Mr. Tessier, we'll go through some other stuff in a
25 minute. Let's go right to that issue.

1 The court just asked if the best you got is a
2 September '04 version of your February '03 contract, that's
3 not too good. Why don't you flip to 502, Mr. Tessier.
4 That's a Heidtman exhibit. What's the date on that one?

5 A. PO date is February 11, 2003.

6 Q. Should have been more specific. What's the status date
7 or the print date -- well, let's back up a second.

8 What does status change mean in your computer
9 system at Fabco, Mr. Tessier?

10 A. Basically, any time we make a change where we print a
11 new copy, for whatever reason, it will put that date there.

12 Q. Is that something you type in, or is it the computer?

13 A. It's computer generated.

14 THE COURT: I'm sorry, say that again, what a
15 status change means.

16 THE WITNESS: It's really a printed date. I
17 mean, any time we make a change to a purchase order, it
18 puts, and you print the purchase order, it puts that date
19 there. The original PO date is the date I've just -- the
20 next line up to the left of it.

21 BY MR. SHARKEY:

22 Q. Now, hold on a second there. Even if you don't make a
23 change, if you went into your computer today and went across
24 the river to Windsor and printed this PO, what would the
25 status change date say?

11/29/04

Witness: J. Tessier

1 A. Say today's date.

2 Q. Just by date of printing?

3 A. Yes. I mean, printing is considered within the computer
4 system a change, but any time you make a change or print,
5 reprint the purchase order, it will dump that date in there.

6 Q. Why do you call it status change, why don't you call it
7 print date?

8 A. Nomenclature, but that's the way the computer program is
9 written.

10 Q. What's the date of this status or print on Exhibit 502,
11 Mr. Tessier?

12 A. 3/14/03 so March 14, 2003.

13 Q. So this is about a month after the PO is issued?

14 A. That's correct.

15 Q. Your Honor, unfortunately, and I'm not -- there's no
16 suggestion of untowardness, the exhibit sticker on the
17 bottom right of that page is 502, it says Exhibit 502. It's
18 a sticker over the original price on this very part that's
19 at issue here, and that's --

20 MR. BOHMER1: You want a stipulation that it
21 would say .297?

22 MR. SHARKEY: Yes. I've got the original here
23 that Mr. Tessier gave to me this morning, I don't know if
24 the Court wants to see it, but right underneath where that
25 Exhibit 502 sticker is the price .297, and that price goes

1 back to March of '03. I guess that's, what, 31 days after
2 the PO was issued. So we can date it back to about a month
3 after the PO is issued.

4 Where's the original one here?

5 THE COURT: Any objection?

6 MR. CAREY: No, no objection. Are you saying
7 you've got the original?

8 MR. SHARKEY: I do. Do you want to look at it?

9 MR. CAREY: Yes. Only take one moment, Your
10 Honor. Didn't mean to slow things down, Your Honor.

11 MR. SHARKEY: I understand.

12 THE COURT: It's all right.

13 MR. SHARKEY: Does the Court want to see it,
14 Your Honor?

15 THE COURT: No, no that's fine.

16 MR. SHARKEY: It's the bottom right hand corner.
17 All it says is .297. The sticker went over it.

18 BY MR. SHARKEY:

19 Q. Mr. Tessier, so the price on this product, you'd seen
20 this email last Friday evening, I guess ten days on the
21 19th, and what did you tell me for the first time that day?

22 A. Well, I told you that the price was, I made a mistake,
23 that I'd missed it, that the price originally back at the
24 beginning of the contract was 29, or 29 cents .297, and part
25 of my -- after having reviewed, having more time to review

1 the document, I came across that. It was purely my mistake.
2 Honest mistake, but I did miss it.

3 Q. Let's flip to 109, Mr. Tessier.

4 MR. CAREY: Object to one thing. Are you
5 suggesting that these are the same part numbers? This is
6 .64 material and your memorandum talks about .63 material.

7 MR. SHARKEY: I believe that it was the same
8 part, yeah. Does it say different, Mr. Carey?

9 MR. CAREY: It does.

10 MR. SHARKEY: I'll go through with Mr. Tessier.
11 But let's go to Exhibit 109.

12 THE COURT: Well, wait a minute. What's the
13 part number that we're talking about on 502?

14 BY MR. SHARKEY:

15 Q. Mr. Tessier --

16 THE COURT: Show me where I can find that.

17 MR. CAREY: Your Honor, it would be at the
18 second page. The line item he's talking about, Your Honor,
19 jumps from the bottom of the first page to the top of the
20 second. I think we just agreed with him that that
21 Exhibit 502 sticker is covering what would say .297.

22 THE COURT: Right.

23 MR. CAREY: You can see the other one above is
24 .307. I'm saying, then, thereafter, Your Honor, if you go
25 to the top of Page 2, you can see what the part number and

11/29/04

Witness: J. Tessier

1 the gauge is and the width of the coil. The gauge is .064.

2 THE COURT: Wait a minute. All right.

3 MR. CAREY: Are you with me, Your Honor?

4 THE COURT: .064/.070 times 54.650.

5 MR. CAREY: Yes, and apparently, Your Honor, the
6 way they do things is that becomes their part number. If
7 you go to the very bottom of Page 1 of Exhibit 502, you'll
8 see they call that part number 6454650, which is 64 gauge at
9 54.65 inches wide.

10 THE COURT: Okay.

11 BY MR. SHARKEY:

12 Q. I think I can clear this up, but I may not be able to.
13 Does the gauge change over time, Mr. Tessier?

14 A. Well, gauge and width can change, and often does,
15 depending on development tooling. Talking hundred
16 thousandths of an inch here, between 063 and 064.

17 Q. I think it's real important -- we're not going to go
18 through our script, Mr. Tessier. What I want to make sure
19 here is we're talking about apples to apples.

20 A. This is the same steel. It's the same part.

21 Q. Let's go through this because I think this is the heart
22 of the deal. Way back on Exhibit 101, Page 3, what we say
23 is the contract, that is part number -- if you go down about
24 the third line, I'm on Page 3 of 101 right now, which is
25 what we say Fabco says is the contract price. That's part

1 number SP253-590, correct?

2 A. That's correct.

3 Q. Let's go over to where Mr. Carey, Heidtman's counsel,
4 has taken us. Let's go to the very last, bottom line, 502,
5 Mr. Tessier.

6 A. Okay.

7 Q. That's part number SP253-590. So this is the same part?

8 A. Yes, yes.

9 THE COURT: 253-590?

10 THE WITNESS: That's actually the material
11 specification, the same specification on both line items.

12 THE COURT: Where's the part number?

13 MR. SHARKEY: The question is -- I want to make
14 sure we're talking about the same part, Mr. Tessier.

15 THE WITNESS: Yeah, I'm on Exhibit 101, and Line
16 item 150.

17 BY MR. SHARKEY:

18 Q. Let me back up here a little bit. The Court's concern
19 as just stated is, can you show me, did you have this
20 purchase order way back in February of '03? And what you've
21 attached here, lawyers, for plaintiff, is a September '04
22 version of this purchase order.

23 Have you been around the whole time the last couple
24 years when this contract was going on?

25 A. Absolutely.

1 Q. Okay. What was the price back in February of '03 when
2 the PO was issued?

3 A. .297.

4 Q. How do you know that? How can the court know that on
5 this part?

6 A. Go back to the original purchase order showing that
7 pricing that was on there. Because each change --

8 Q. Well, okay. Well, you don't have the original purchase
9 order as far as I can tell.

10 A. The way it works, Your Honor, is when the price changed,
11 the line item is canceled, closed.

12 THE COURT: You know what? You're really
13 familiar with this stuff, and I'm not, so when you start
14 talking about line items, and I'm looking at a four-page
15 invoice, that's not really useful to me. You're going to
16 have to walk me through this because all I see here is on
17 502, a status change, which you've told me is not really a
18 status change, it's just printed out, that talks about, you
19 know, it's a four page, five page -- what are you talking
20 about?

21 MR. SHARKEY: Let me try to help, Your Honor.

22 THE COURT: Let's let the witness try to help.

23 MR. SHARKEY: Yes, ma'am.

24 THE WITNESS: On Exhibit 502, if you go down to
25 the bottom line on the left-hand side, you see 10, 20, 30,

1 40. Line 40, it says "new" next to it, circled there.

2 THE COURT: Yes.

3 THE WITNESS: That is the order for that
4 particular part number, added to that purchase order on, and
5 status change date is 3/14/03, so we added that part number
6 on that date, that was new, .7290.

7 THE COURT: So this is the first time you've
8 ordered this part?

9 THE WITNESS: Yes.

10 THE COURT: That's what the "new" means?

11 THE WITNESS: That's correct.

12 THE COURT: And this part number is 006454650,
13 et cetera?

14 THE WITNESS: Yes. That is the, an internal
15 number designating coil gauge and width, and then the
16 SP253-590 is the specification of the steel, customer
17 specification, and if you go to the next page, well, part
18 number it's used on, basically, we have, that becomes the
19 customer part number. So our part number internally is
20 different than the customer part number. It's a finished
21 good number.

22 THE COURT: What part number am I looking at
23 here?

24 THE WITNESS: Go to that, just above, as you go
25 down to the paragraphs there, you see the part number, used

1 on part number --

2 THE COURT: Yes.

3 THE WITNESS: And that's the actual finished
4 good part number that Nissan recognizes in their system. So
5 we just use that as a reference.

6 THE COURT: Okay.

7 BY MR. SHARKEY:

8 Q. And those change --

9 Excuse me, Your Honor. Are you finished? I
10 apologize?

11 THE COURT: Well, now I need you to tie this to
12 what you're talking about in 101 being the same part number.

13 BY MR. SHARKEY:

14 Q. That part number will change, Mr. Tessier, based on the
15 change in the specs; in other words, this one changed from
16 63 to 64?

17 A. I'm looking at 10. Yes, that is correct. It went from
18 64 to 63.

19 THE COURT: Okay. Now show me what you're
20 looking at.

21 THE WITNESS: Okay. On the original we just
22 talked about where it said line 40, new, back in 3/14/03,
23 was a 64 gauge by 54 wide, and then the change on 9/23/04,
24 on Line -- I'm sorry, on Page 3 it says on the left-hand
25 side, you see 150, that's Line 15.

1 THE COURT: Yes.

2 THE WITNESS: That's the same part number.

3 Well, it's 063 by 54, so it's gone down a thousandths of an
4 inch in gauge, and it's changed a little bit on the width.
5 The specification remains the same, for all intents and
6 purposes, it's the same steel for the same finished good
7 assembly at Nissan. So it's just an update of the purchase
8 order. As the program develops --

9 THE COURT: What does the OPN stand for next to
10 150?

11 THE WITNESS: It just means it's open line item.

12 THE COURT: All right.

13 THE WITNESS: And if I may, as this develops,
14 this is a normal course of action at Fabco, you order steel,
15 and as you develop and you build your tooling and you
16 perfect the process to make these parts, you optimize the
17 width of the coil and the gauge for weight savings and
18 minimizing the amount of scrap you trim off. So that's
19 typically when we get down later, and just before production
20 you get down to your final size, you know exactly what you
21 need, and you update your purchase order to include the
22 actual production size, but it's a matter of over months, it
23 may change up to an inch in width sometimes, up to two
24 three, four, five thousandths of an inch in gauge, just
25 depending on how you make the part.

1 So that's a normal development, course of action
2 when we're making these parts. They're pretty
3 sophisticated.

4 THE COURT: All right.

5 BY MR. SHARKEY:

6 Q. So back when the contract was let in February of '03,
7 you knew for a year or so you were going to be prototype and
8 engineering, not volume ordering, correct?

9 A. That's correct.

10 Q. So the specs change slightly as you refine that process?

11 A. Uh-huh.

12 Q. Okay. You have to say yes.

13 A. Yes.

14 MR. SHARKEY: Your Honor, I'm going to go
15 through what I see is the key things, but if the Court wants
16 to speed me along, please do.

17 BY MR. SHARKEY:

18 Q. Mr. Tessier, you're the director of purchasing at Fabco,
19 correct?

20 A. That's correct.

21 Q. You've been there for six years?

22 A. That's correct.

23 Q. You've worked in the automotive industry for about 18
24 years?

25 A. That's correct.

1 Q. As the name implies, you're responsible for all the
2 direct buys for the company, correct?

3 A. Yes.

4 Q. And you were the one who sent me originally what is now
5 Exhibit 101, was Exhibit A to our motion, and that is the
6 purchase order S100158, correct?

7 A. That's correct.

8 Q. And you don't dispute Heidtman's contention, do you,
9 that on other parts and at other times that Fabco has
10 granted price increases.

11 A. No, I don't dispute that.

12 Q. Why?

13 A. Well, you mentioned earlier in some of your opening
14 statements, we granted some price increases to secure
15 product on threat of, you know, nondelivery and nonshipment.
16 The decision by myself at the time to do that was to keep
17 our customer in parts, which ultimately is more important or
18 the most important thing down the chain. So we protect
19 against it as best we can.

20 Nissan to us is a very important customer, and you
21 said earlier today, you only shut them down once, and it
22 becomes a very big deal, the company loses a lot of money.
23 It can cost quite a bit to shut them down. And also
24 there's, I guess what you said is your, if you look in
25 general in the industry, you don't want to be seen as a

1 company that can't manage their supply base, can't deliver
2 on time, can't keep the production line going. It can
3 damage your reputation quite a bit, quite frankly.

4 Q. What the Court is saying, come on, guys, you're really
5 not going to shut down Nissan, what you're saying is someone
6 is going to get stuck with the bill until this can be hashed
7 out.

8 A. No, it can happen. In fact, it did happen this
9 particular summer.

10 Q. It being what, what happened?

11 A. Well, we were late on some parts due to supplier issues,
12 and we shut their assembly line down for a couple hours one
13 day. Got a lot of high profile, CEO of the companies
14 involved, and it becomes a major issue, quite frankly.

15 Q. To back up a second, Fabco takes the coil and they build
16 a beam; correct?

17 A. That's correct.

18 Q. And how often does Fabco get steel from Heidtman?

19 A. They ship weekly I believe. There's, yeah, there's
20 weekly shipments of I believe it's two coils a week.

21 Q. So Heidtman's plant is in Butler, Indiana, correct?

22 A. That's correct.

23 Q. And the steel coil comes down to Fabco in Springfield,
24 Tennessee, correct?

25 A. Yes.

1 Q. And does Fabco get this steel coil from anywhere else?

2 A. No, we do not.

3 Q. After Fabco gets the steel and makes this beam, how
4 often does it ship to Nissan?

5 A. We ship daily to Nissan from our plant in Springfield.

6 Q. Does anybody else supply the steel beam to Nissan?

7 A. No, that's --

8 MR. BOHMER1: Objection.

9 THE WITNESS: No.

10 THE COURT: What's your objection?

11 MR. CAREY: I don't know how he would know about
12 what Nissan's acquisition practice is and purchase practices
13 are.

14 THE COURT: Well, if he knows, he can testify to
15 it. To the best of your knowledge.

16 THE WITNESS: Absolutely.

17 BY MR. SHARKEY:

18 Q. Well, I mean, in point of fact, you deal quite a bit
19 with the Nissan relationship, don't you?

20 A. Yes, I do. I mean, I'm the main point of contact. I'm
21 ultimately responsible for the flow of materials from our
22 suppliers to our manufacturing plants.

23 Q. Just say today the worse happened and Heidtman stops
24 shipping, no more steel, guys. How long would it take for
25 what they call the parade of horrors? And I agree, how

1 long would it take for Nissan to shut down? How long would
2 it take for that shortage to work its way through the line?
3 A. Typically, we have our manufacturing inventory work in
4 process or finished goods inventory maximum a week, and then
5 Nissan's a day, two tops, internally, of their inventory,
6 and I know that from our materials people who deal daily
7 with those people at the plant. This is a very large part
8 that, it's not like a small widget that they might keep a
9 couple weeks' inventory. This is daily, one or two days max
10 at the assembly plant at Nissan.

11 Q. Is this something that this part, because I've never
12 seen one of these steel coils. It's kind of abstract to me.
13 Is this something you could call other steel suppliers and
14 get this thing?

15 A. No. As a matter of fact, the reason we're, we bought
16 this coil or this product from Heidtman is that really it
17 was the only spot we could find it, one of the few suppliers
18 we knew. Typically, Fabco policy is to buy steel,
19 especially of this volume and of this importance off Nissan
20 as a steel resale program we call it. And typically,
21 through their purchasing, steel purchasing group, we buy our
22 steel through them. We approach --

23 Q. Just stop for just a second. I understand this because
24 you explained it a couple times. On a lot of steel buys,
25 some of the OEM's, including Nissan, direct the lower tiers,

1 like Fabco, here's where you're going to get your steel
2 from; correct?

3 A. You -- I mean, yes, that is correct. You choose to buy
4 out, as we do, Fabco, we buy all our steel, all our steel
5 for this program is bought for this Pathfinder, X-Terra, is
6 bought through the Nissan resale program except for this
7 particular item which was not available at the time through
8 the Nissan program because of the combination of the, I'll
9 call it an exotic, not exotic, but not a common material
10 specification, and the width, size of the coil.

11 The Nissan-approved suppliers are ISG and U.S.
12 Steel, and neither one of those two could produce this type
13 of material. So that's why we were purchasing it through
14 Heidtman, because they could provide it.

15 Q. If Heidtman said to you today, you know, we are hereby
16 terminating this contract period, we'll cover you however
17 you long you need it, but you need to use all expedience to
18 go find this product from someplace else, how long would it
19 take you?

20 A. Typical lead time in the industry is at least, right now
21 is 16 weeks. We would need at least four or five weeks
22 to -- probably at least five to find somebody. In that 16
23 weeks, we'd bring it in, test it. Typically, when you buy
24 steel from a different manufacturer, there are subtle
25 differences. You have to retune, we call it spotting,

1 retune your dies. That can take up to a couple weeks.

2 Anywhere between I'd say 20, 24 weeks at a minimum
3 it would take us to secure different steel.

4 Q. You've got a lot of buyers coming to you for money this
5 year, don't you?

6 A. Unfortunately, yes.

7 Q. Why couldn't you work this one out?

8 A. Well, quite frankly, I had been negotiating with most of
9 our suppliers. One of the premises is that we try to share
10 the pain, and we have done that with some of our suppliers.
11 I mean, we had nowhere to go with it. Our customers, the
12 OEM's, are still demanding their annual price reductions.
13 They won't entertain any of the increases, and they want
14 their annual price reductions.

15 So one of the ways senior management does this is
16 if you have at least a minimum of shared responsibilities,
17 at least looked at, I can't get it from OEM, they can't get
18 it from their supplier so a shared responsibility, share the
19 pain so to speak, is something we at least consider. We've
20 done that in the past, but when I spoke with Bob Millar
21 and --

22 MR. CAREY: Objection. I think he's going into
23 settlement discussions that were had between the parties,
24 Your Honor. I'm not sure why he's testifying about it.

25 THE COURT: Well, I mean, the exclusion of

1 settlement discussions is only for limited purpose.

2 MR. SHARKEY: Your Honor, I believe it's just
3 for liability under 407.

4 MR. CAREY: 408.

5 MR. BOHMER1: Your Honor, I'm certainly not
6 ashamed of Heidtman's position. I'm just saying I think
7 under 408 it's inadmissible -- undue delay.

8 THE COURT: No, it's just excludable for
9 specific purposes. I mean, I read it as saying it's not
10 admissible to prove liability, the liability or invalidity
11 of the claim or the amount. Well, we're not really talking
12 about that. And then it gives other purposes such as
13 proving bias or prejudice of a witness, showing a contention
14 of undue delay, et cetera, but that's a "such as," that's
15 not an exclusive list.

16 MR. CAREY: It's not something I really want to
17 argue about, except, Your Honor, I feel remiss. I've always
18 read that statement, evidence of conduct of statement, is
19 like it was not admissible. The conversations he's talking
20 about would have been raised after the litigation was filed.

21 THE COURT: Likewise not admissible means to me
22 to prove liability as the previous sentence suggests.

23 MR. CAREY: I understand, Your Honor. I'll sit
24 down. Thank you.

25

1 THE WITNESS: We discussed that, and I had
2 explained to Bob and Mark at the time that, if they were
3 willing to look at sharing the difference in the pricing
4 that I would bring to it up to the executive management and
5 see if there would be an opportunity. Because that was
6 really, for us as a company, you know, something we try to
7 work with our suppliers on, but we don't -- we expect there
8 to be at least some shared responsibility.

9 BY MR. SHARKEY:

10 Q. I'd like you to skip to Heidtman Exhibit 520. I think
11 you'll see the first page is, this is a ThyssenKrupp,
12 different company, same parent, ThyssenKrupp Fabco. They
13 indicate this is a printout from the website. Want you to
14 flip to the second page, and I may be not representing this
15 fairly, but my memory of Heidtman's papers was, look,
16 ThyssenKrupp Fabco's parent company is passing on steel
17 price increases to other people.

18 I'd like you to focus your attention to the far
19 right column, about the middle, starting with the words
20 Waupaca's contracts there. You see it?

21 A. Yes.

22 Q. I'm going to read that part of that.

23 Waupaca's contracts with customers include a
24 surcharge clause that provides for a price adjustment in
25 response to changes in the cost of raw materials.

1 Does this contract have that kind of clause?

2 A. Absolutely not.

3 Q. If we had an escalation -- and you know what an
4 escalation clause is, right?

5 A. Uh-huh.

6 Q. Yes?

7 A. Yes.

8 Q. If we had an escalation clause, would we be here?

9 A. Absolutely not.

10 Q. To finish, I wanted to talk about one thing you
11 mentioned. I think you mentioned it briefly is, can you
12 pass -- I mean what they're saying is look, guys, contract
13 says 35 cents, we want 51 cents. Can you just take this 17
14 cents and pass it on to Nissan and say, look it, our
15 suppliers are asking for a higher price?

16 A. No. As a matter of fact, I know the automotive
17 industry. The expectation of the OEM's is annual price
18 reductions, not increases. Nobody gives increases out
19 there. We all know, we've been in the business, it doesn't
20 happen. And as a matter of fact, we spend a lot of effort
21 trying to improve productivity to be able to keep up with
22 the price reductions that they demand annually.

23 Q. It's not just the automotive industry. Specifically,
24 Fabco's contract with Nissan requires an annual price
25 reduction, right?

1 A. Yes, it does. This particular program, specifically,
2 that these parts are for, we have to give back year after
3 year productivity. Our price for those parts reduces each
4 year.

5 MR. SHARKEY: Thank you, Mr. Tessier.

6 THE COURT: Let's take a break for about 10, 15
7 minutes.

8 (Recess taken 11:15 until 11:35 a.m.)

9 MR. SHARKEY: May I bring Mr. Tessier back to
10 the stand?

11 THE COURT: Please. Proceed.

12 MR. CAREY: Your Honor, I do have two
13 preliminary matters. I think we're about due for our
14 answer, and may I ask for an extension to file our answer?

15 THE COURT: I granted that.

16 MR. CAREY: Two weeks is fine.

17 THE COURT: Two weeks is fine. If you want
18 three, you can have three.

19 MR. CAREY: I'll take three then. Thank you,
20 Your Honor.

21 Second, based on the testimony that was elicited
22 regarding the invoices and what they haven't paid, I think
23 again they've pretty much conceded they have no damages at
24 this time in terms of the jurisdictional amount, and --

25 THE COURT: Oh, I disagree. Go ahead.

1 MR. CAREY: Thank you, Your Honor.

2
3 **CROSS EXAMINATION**

4 BY MR. CAREY:

5 Q. Mr. Tessier, John Carey, one of the attorneys for
6 Heidtman.

7 You filed a declaration in which you state -- and
8 it's Exhibit B, I think, but it's the one that was submitted
9 with the complaint. You state, I am personally familiar
10 with the February 11, 2003, purchase order number S100158.

11 But in fact have you ever seen this purchase order
12 of February 11? Do you have a copy of it?

13 A. Yes.

14 Q. It's not an exhibit, is it?

15 A. I don't believe so. Well, no, that's not true either.
16 Actually it is in here. I think it was 520, we talked
17 about -- no, I'm sorry. I believe I explained it earlier
18 where it showed -- that was the particular date that that
19 contract was, or that product was added to that purchase
20 order.

21 Q. That's the one that's dated March 14, 2003. Is
22 Exhibit 502.

23 A. That's correct, 502, that's correct.

24 Q. Have you ever seen the predecessor to 502?

25 A. Predecessor, I guess I'm not --

1 Q. Well, Exhibit 502 is dated March 14, 2003. It's a
2 change from a purchase order dated February 11, 2003, so 502
3 is changing something else. I want to know if you've ever
4 seen the something else.

5 A. Yeah, on 502 the change is the addition of Line 40
6 there, adding this part number in question.

7 Q. Okay.

8 A. The other three items were previously on there.

9 Q. Okay.

10 THE COURT: The question remains have you ever
11 seen -- I mean, I understand what you're saying, but this is
12 the first purchase order that ever referenced this part
13 number that's at issue in this dispute, but is there an
14 original purchase order dated 2/11/03 that we might look at
15 it?

16 THE WITNESS: I didn't -- yes, we would likely
17 have that at Fabco, but I don't have that. It's not part of
18 this. What it would show would be the first three line
19 items on there without the fourth number on there.

20 THE COURT: Okay. Could I ask you a couple
21 questions about that, please?

22 THE WITNESS: Uh-huh.

23 THE COURT: All right. Exhibit 101, which is
24 the September change order, right?

25 THE WITNESS: Yes, ma'am.

1 THE COURT: Status change, or whatever you're
2 calling it. Has as its last page some general terms and
3 conditions, right?

4 THE WITNESS: Yes, ma'am.

5 THE COURT: Are those general terms and
6 conditions a part of all Fabco purchase orders, or are they
7 different -- I guess my question is how do we know that
8 they're the same with respect to 502, which is the first
9 time that we mentioned the part at issue here, or the
10 underlying purchase order, the one dated February '03 that
11 we don't have at all. How am I supposed to know the general
12 terms and conditions of the original purchase order?

13 THE WITNESS: These terms and conditions are
14 preprinted on the back of our forms, so they're actually on
15 the back, boilerplate on the back of the form. So the form
16 doesn't change. It's the same for every purchase order that
17 we issue, so it's been in effect since these terms, I
18 believe, 2000 and 2001. So we've never changed those forms.
19 We continue to use the exact same forms. It would be the
20 same on every purchase order.

21 THE COURT: So this is the same general terms
22 and conditions which would have been on the back of the
23 purchase order that is reflected in Exhibit 502 and the
24 original purchase order dated February whatever, 11, '03
25 that is not an exhibit?

1 THE WITNESS: That is correct.

2 MR. CAREY: Thank you, Your Honor.

3 BY MR. CAREY:

4 Q. As to this -- we'll talk about it later. One question,
5 this part that you're suing over, and you call it part.
6 Actually, it's a coil of steel, right?

7 A. That's correct.

8 Q. It's got a gauge of 63 thousandths, it's 54.875 inches
9 wide, right?

10 A. That's correct.

11 Q. And it's got a certain specification?

12 A. Uh-huh.

13 Q. But that's all it is, it's just a coil of steel, right?

14 A. Of a specific gauge and width and specification, that's
15 correct.

16 Q. Will you agree with me that part number 6354875 did not
17 exist on February 11, 2003 because you'd never assigned it a
18 part number? Or you weren't buying it? You were buying
19 entirely different material under this 502, right, you were
20 buying the 64 gauge material?

21 A. I was buying steel for the particular part number for
22 the finish part number.

23 Q. We don't make the Nissan part, right? So I don't care
24 about the Nissan part number. What we're talking about,
25 what you buy from Heidtman is a coil of steel, correct?

1 A. That's correct.

2 Q. 64 gauge under Exhibit 502, correct?

3 A. Yes, on this purchase order, it was 064 gauge.

4 Q. I'm going to represent to you that the first time that
5 Fabco ever had a part number 6354875 was July of this year.

6 A. Yeah, that could be correct.

7 Q. Okay. So purchase order S100158 originally was not out
8 there to buy the part number you're suing over; correct?

9 A. I would disagree with that.

10 Q. Well, what part number do you have on -- what's to
11 disagree with? You can read it on your purchase order.

12 A. Well, it might be slightly different gauge and width,
13 but it was the same material for the same part. The intent
14 of the purchase was the same. Like I explained earlier,
15 there's often changes in gauge and width. These are very
16 subtle. We've seen larger swings than this, but a
17 thousandths of an inch, an eighth of an inch in width.
18 Those are typical, normal changes.

19 THE COURT: And I'm buying that, unless you have
20 something that says to the contrary.

21 MR. CAREY: Okay.

22 THE COURT: I mean, unless you have someone who
23 is going to testify that it's a different part, different in
24 that, you know, there's something other than the one
25 millimeter change in the width of the gauge.

1 MR. CAREY: And several inches change in the
2 width of the coil.

3 THE COURT: Whatever. I mean, if it's the same
4 coil for the same, going into the same Nissan part, then --

5 MR. CAREY: Okay.

6 THE COURT: I mean, you know, I accept that.

7 BY MR. CAREY:

8 Q. Would you take a look at Exhibit 501, please? And we
9 will see Mr. Staddon throughout this correspondence. Mr.
10 Staddon works for you?

11 A. That's correct.

12 Q. What's his title?

13 A. He's a steel buyer.

14 Q. And it says March 13, 2003 email to Heidtman, correct?

15 A. Yes.

16 Q. And it talks about the model year 2005. Do you see that
17 at the top?

18 A. Okay. 2005 model year, WQW, yes.

19 Q. What is the model year to you, in your business?

20 A. It's the OEM's, the year that they're bringing out that
21 particular, a particular vehicle.

22 Q. In terms of manufacturing, it runs from when to when?

23 A. Typically, the new -- well, it's hard to say.

24 Q. I'm talking about the model year 2005 for Nissan.

25 A. October 2004 is when it starts. The vehicles are

1 available to the general public.

2 Q. When would they begin manufacturing the 2005's?

3 A. August.

4 Q. And when would they quit making 2005's?

5 A. That particular vehicle I believe is four years --

6 Q. Four years?

7 A. A 2004 year-long model.

8 Q. No, the model year 2005 --

9 A. Okay.

10 Q. If they start in August, don't they?

11 A. End of July.

12 Q. And --

13 A. End of July.

14 THE COURT: One at a time, please.

15 BY MR. CAREY:

16 Q. And in this email, it's asking for a .065 material;
17 correct?

18 THE COURT: I'm sorry , what exhibit number?

19 MR. BOHMER1: 501, Your Honor.

20 THE WITNESS: 065, that's correct.

21 BY MR. CAREY:

22 Q. But you'll agree with me that that became the 064
23 material that's in Exhibit 502?

24 A. Yes.

25 Q. It's the next day, right?

11/29/04

Witness: J. Tessier

1 A. Yes.

2 Q. And by the next day, go from 065 to 064, and eventually
3 this would become 063, is that --

4 A. That's correct.

5 MR. CAREY: Mr. Sharkey, you had the original?

6 MR. SHARKEY: Yes, this is the original 502.
7 It's got the terms and conditions on the back if you want to
8 see it.

9 MR. CAREY: May I approach the witness, Your
10 Honor?

11 THE COURT: Sure.

12 BY MR. BOHMER1:

13 Q. It's not marked as an exhibit, but the indication is
14 that that is the hard copy original of Exhibit 502.

15 A. Yes.

16 Q. And it's signed by whom?

17 A. That's my signature.

18 Q. That's signed by you, Mr. Tessier?

19 A. Yes.

20 Q. Do you have a copy of this signed by anybody at
21 Heidtman?

22 A. I don't believe we do.

23 Q. Okay. So the original is in your possession, so doesn't
24 that mean that original is not in our possession? My point
25 is, don't you fax these things to us?

1 A. There's multiple copies here that would have been taken
2 off, and original mailed to Heidtman. Initially, we fax,
3 and then we mail the original. So this is my original copy
4 but Heidtman would have received an original as well,
5 because this is a four-part form. We send two to the
6 supplier and keep two copies for ourselves.

7 Q. Do you know if that was the practice by Mr. Staddon and
8 Mr. Millar?

9 A. That is the practice that's for all purchase orders,
10 that's our procedure.

11 Q. If we were going to -- if the testimony would be that
12 all of your purchase orders were faxed to Heidtman, would
13 you disagree with that?

14 A. I would say likely -- no, I wouldn't disagree. I can't
15 be certain what my buyer did on every purchase order, but
16 typically to get the order out there right away, we fax a
17 copy and then put the hard copy in the mail.

18 Q. This Exhibit 502 has an expiration date on 12/31/39?

19 A. That's correct.

20 Q. It's been indicated that that indicates a spot buy of
21 material, that it represents a one-shot purchase. Do you
22 agree with that?

23 A. I would disagree.

24 Q. You would?

25 A. If I understand your question correctly, this is not a

1 spot buy, so I would disagree with that.

2 Q. What is the significance of 12/31/39?

3 A. That's the expiration date, but that was computer
4 generated. If you didn't actually put something in there,
5 it was a default date in the computer software in the
6 software program for this.

7 Q. And this is purchase order S100-158, isn't it?

8 A. Yes, it is.

9 Q. Why are there no pounds specified on this purchase
10 order?

11 A. The way this purchase order is set up, it's a blanket
12 purchase order, and if you read through the text, it says to
13 shipper releases. The blanket order basically gives us a
14 price for specific time frame, a contract for specific price
15 and specific time frame. The material, the actual
16 requirements is estimated based on the customer's wait of
17 the part times of customer's estimated volume. So our
18 plants actually release material as it's required by our
19 customer, and the customer gives us requirements, and then
20 we release it to the supplier through the plants
21 individually. At the beginning, we estimate the tonnage
22 required based on the weight of the part times how many
23 vehicles a year Nissan is planning to build.

24 Q. What was the time frame for this purchase order?

25 A. Time frame, my opinion, is for the length of the -- we

1 need these parts for the length of the vehicle program which
2 I say runs typically four to five years.

3 Q. So you thought this might have a four- or five-year life
4 span, this purchase order?

5 A. That's correct.

6 Q. But it doesn't say that anywhere, does it?

7 A. Not in the body of the -- I don't believe so, in the
8 body of the text. I mean, this is --

9 Q. How then would Heidtman understand that you thought this
10 was a four- or five-year purchase order?

11 A. Well, again, in my opinion, and there was a lot of
12 discussion between sales reps from Heidtman and my steel
13 buyer. Typically, we would buy this material from Nissan in
14 their resale program. The reason we didn't buy it this time
15 was because it wasn't available through their program.
16 That's why we came to Heidtman. And I know my buyer and
17 sales representative talked about it. They knew
18 specifically this was for the Nissan WQW program, platform,
19 which is the Pathfinder and X-Terra, and that, you know,
20 this is a specific job for a specific platform, and it's a
21 new vehicle, new launch, it's a big thing for Fabco and why
22 are we not buying this from Nissan? Can't buy it from
23 Nissan. And so I claimed that Heidtman knows specifically
24 what this is for, and that is very program related, and
25 these programs don't typically last six, seven months. They

1 last three, four, five years.

2 Q. These were in conversations, or is this what somebody
3 was telling you about?

4 A. Well, this is conversation with my steel buyer. I was
5 not specifically at every meeting between sales
6 representation and my steel buyer.

7 MR. CAREY: Then I move to strike all that, Your
8 Honor. He has no personal knowledge of the conversation.

9 MR. SHARKEY: Your Honor, my brief response
10 would be it's in, part of his business duties as a
11 supervisor of all buyers is part of this information. If we
12 want to call Mr. Staddon, we certainly can call him to
13 testify firsthand, but Mr. Tessier is a supervisor. If I
14 don't bring the supervisor and I bring the buyer, the buyer
15 is in a very narrow lane, doesn't understand everything, and
16 I get in trouble for not bringing the supervisor.

17 THE COURT: Well, he can't testify with respect
18 to what the buyer said to Heidtman, but I mean, I'm not
19 going to strike it. I'll just take it for what it's worth.
20 He has no personal knowledge. To that extent, it's hearsay.

21 I guess I have a question along these lines.
22 Excuse me for interrupting your examination, but I was kind
23 of flipping through these purchase orders, and I notice 502,
24 503, 504, all of which are status change orders in '03, have
25 that same default expiration date, which I don't know why

1 you guys use that, but I mean it doesn't seem to make sense,
2 but that's through 507, 508, and then in January of '04
3 we're seeing for the first time an expiration date
4 of 9/25/06. How did that change come about? This is along
5 the same lines Mr. Carey was asking.

6 THE WITNESS: Your Honor, you picked up exactly
7 on what the internal auditors at ThyssenKrupp Fabco picked
8 up on, quite frankly. That default date wasn't acceptable
9 so we changed in January of '04 our computer software
10 program so that you could not default that date anymore.
11 You had to put in an expiration date. So it was an internal
12 control that was directed from ThyssenKrupp organization
13 that we changed, and we did that in January '04.

14 THE COURT: Was this a system-wide or
15 company-wide change?

16 THE WITNESS: Company-wide for Thyssenkrupp
17 Fabco, yes.

18 THE COURT: So all of your purchase orders prior
19 to this had this default date in it?

20 THE WITNESS: That's correct, Your Honor.

21 THE COURT: So what documentary evidence is
22 there that Heidtman was ever informed that this was a
23 contract that was anticipated to -- that they were entering
24 into a requirements contract that was to last until
25 September 5, '06?

11/29/04

Witness: J. Tessier

1 THE WITNESS: Other than a copy of the purchase
2 order that has that on there, and again, in conversations
3 with my steel buyer, the conversation with the sales
4 representative that this was, you know, a specific program
5 and things and how long it lasted, but there's nothing in
6 this book that I know of that we provided other than the
7 discussions between buyer and sales representative at
8 Heidtman.

9 THE COURT: So can you look at Exhibit, I guess
10 this is 509, and find the part that we've been talking about
11 here, and the price?

12 THE WITNESS: This copy is really difficult to
13 read.

14 THE COURT: Well, there's a couple copies in
15 here that all seem to be --

16 THE WITNESS: Okay. On 509 --

17 THE COURT: Or you can use 510. That has a
18 status change of 1/7/04 also, and I can see that there is a
19 Line 70 open. That's the price, that's the --

20 THE WITNESS: That's the product in question.

21 THE COURT: In question, right?

22 THE WITNESS: That's correct.

23 THE COURT: And that price is 297?

24 THE WITNESS: That's correct. Your Honor, if I
25 may just go further, if you look down further to Line 80,

1 there's additional one there, as well.

2 THE COURT: Right. Now, are there purchase
3 orders between that January '03 one and the September '04
4 one we've been looking at? Or January '04 and
5 September '04. I thought there were.

6 THE WITNESS: There is. There would be, the
7 purchase order number would remain the same, but there would
8 be some changed statuses there. For example --

9 THE COURT: Do we have them as exhibits, do you
10 know?

11 MR. BOHMER1: I can direct the Court to one.
12 The one I referenced earlier, Your Honor, Exhibit 532.

13 THE COURT: Okay. Do you know of any others?

14 THE WITNESS: Off the top of my head, I believe
15 between that period of time, I don't believe anything else
16 was added to that.

17 THE COURT: So likely we have the one in
18 January, the one in July, and the one in September?

19 THE WITNESS: I believe that to be correct, Your
20 Honor.

21 THE COURT: And what prompted the shipments?
22 The shipments were coming weekly without individual orders,
23 or how did Heidtman know how much to ship?

24 THE WITNESS: They would receive what we call a
25 material release from the plant. There's planning, figures

1 going out in the future, and it's specific for the next
2 couple months, weekly requirements, and then three or four
3 months further out what the anticipated volumes are going to
4 be.

5 THE COURT: But they wouldn't be purchase
6 orders.

7 THE WITNESS: No, they would not be. They would
8 be material releases. It's just a document that shows
9 numbers, requirements, and dates, basically.

10 THE COURT: Okay. Go ahead. I'm sorry to
11 have --

12 MR. CAREY: Not at all, Your Honor.

13 BY MR. CAREY:

14 Q. Coming back to this 12/31/39 date, what would you tell
15 people when they'd ask you about that?

16 A. Quite frankly, I don't recall ever personally myself
17 having somebody complain about that. I have many suppliers
18 receive exact purchase orders as these with that date on it,
19 so I can't really comment, to be honest with you, Mr. Carey.

20 Q. And last, Exhibit 502, you'll see at the bottom that
21 there's a, you have to read the bottom upside down, but it
22 shows that there was pages, it says it's from ThyssenKrupp
23 Fabco Windsor, and then it says Page 1 of 1 and then Page 2
24 of 2. Page 1 of 2 and then Page 2 of 2. Do you see what
25 I'm showing you at the bottom?

1 A. I can see something on the first page but not on the
2 second. Okay. All right. Yeah.

3 Q. That would indicate that, as I -- will you share my
4 understanding that this means that these are two pages that
5 were faxed, and only these two pages?

6 A. I believe so.

7 Q. So the terms and conditions would not have been sent.

8 A. Not in the fax, no, but in the original mailed documents
9 they would have been.

10 Q. At this time in early 2003, who else were you trying to
11 get steel from besides Heidtman?

12 A. In terms of for this particular product?

13 Q. Yeah, we'll say for this 063 material.

14 A. We approached, naturally approached our customer through
15 their steel resale program. I'm not quite sure, Tom
16 Staddon, my buyer, might have approached some other
17 potential steel suppliers.

18 Q. You say in your statement that this part is designed and
19 formulated to meet Nissan requirements. It's a coil of
20 steel, so who designed this coil of steel?

21 A. The engineers at Nissan would set the spec. The
22 engineers at Fabco would determine the width, I believe the
23 Nissan engineers also determine approximate gauge.

24 Q. You know Heidtman doesn't make steel; correct?

25 A. That's correct.

1 Q. Who make the steel?

2 A. I believe Steel Dynamics is the provider of all raw
3 material of the substrates.

4 Q. And do you think this steel was designed for you?

5 A. I believe it is, yes.

6 Q. By Steel Dynamics?

7 A. That's correct. The recipe for the steel would be
8 designed specifically for us.

9 Q. Can the steel be used for anything else in the world?

10 A. I believe it could be, sure.

11 Q. In fact, they were making the deal before there was the
12 part, isn't that true?

13 A. That I don't know, sir.

14 Q. You think steel in 063 gauge was not available before
15 February of 2003?

16 A. At this specification and width, I believe it was.

17 Q. Right. So you could buy the steel from Steel Dynamics,
18 couldn't you, because they're still making it?

19 A. I've never approached but Steel Dynamics. I suppose
20 it's conceivable that they make --

21 Q. Sure. Since that's where we get it, that's where you
22 could get, right?

23 A. Yes.

24 Q. You could also make this part from cold rolled steel?

25 A. I don't know that, to be honest with you. I'm not sure

1 if cold rolled steel can be purchased in this specification.

2 Q. Do you know of any other steel mills that make this
3 material.

4 A. No, I do not.

5 Q. Do you know if Thyssen could make this material?

6 A. I don't know that.

7 Q. You don't know one way or the other?

8 A. No, I don't.

9 Q. That's because you've never inquired, have you?

10 A. No, not that I'm aware of. I'd have to ask Tom Staddon
11 but --

12 Q. No, have you ever inquired?

13 A. Personally, no.

14 Q. So what does Heidtman do that makes this steel so
15 special?

16 A. They're the only ones that I'm aware of that were able
17 to supply it in North America that was, that were able to
18 meet the specification and -- width, gauge and specification
19 combination was something unique, so they were the only
20 company that we could find in our market search that --

21 Q. Gauge comes from the mill, doesn't it?

22 A. I believe so, yes.

23 Q. So there's nothing about Heidtman that makes the gauge
24 of the steel, that's Steel Dynamics, correct?

25 A. That's correct.

1 Q. Width of the coil, Steel Dynamics?

2 A. Yes, I believe. They slit it to Heidtman's
3 specification.

4 Q. How many other slitters are there in this part of the
5 world do you think?

6 A. Say a hundred, I guess.

7 Q. In fact, ThyssenKrupp Fabco can slit steel, can't it?

8 A. Thyssenkrupp Fabco doesn't have slitting capability, no.

9 Q. How about Thyssenkrupp Steel?

10 A. There's somebody probably within the Thyssen
11 organization that slits. I'm not familiar with the steel
12 division of ThyssenKrupp.

13 Q. So if you've got Steel Dynamic steel from one of our
14 competitors, you'd be identically in the place you are now,
15 wouldn't you?

16 A. No, I believe we'd still have to have it picked up and
17 slit and packaged and shipped and all that. That's part of
18 the service that Heidtman provides us.

19 Q. So if Heidtman picked up a coil of the steel. And Steel
20 Dynamics and took it to another slitter and they slit it,
21 you'd be in the same place, right?

22 A. Sure, I believe so.

23 Q. So all you're trying to get from us is slitting
24 services, right?

25 A. Slitting, pickling, package --

1 THE COURT: You're going to talk your client out
2 of a job.

3 BY MR. CAREY:

4 Q. What would happen if Steel Dynamics stopped making this
5 063 material?

6 A. We would have a problem. We'd have to go to our
7 customer and let them know steel would be unavailable, and
8 from that point, I don't know what typically happens, you
9 know, the discussion that begins, what would happen, what we
10 would do. There would have to be some sort of remedy to
11 that, I guess.

12 Q. Don't you have a back-up plan of some kind? Very
13 concerned about shutting down these plants. If Steel
14 Dynamics decides not to make the steel next week, what
15 happens?

16 A. We have a big problem, that's for sure. And this isn't
17 an unenviable position to be in. This type of steel is
18 difficult to buy. If there's standard cold rolled steel
19 that's of standard grade and of standard specification that
20 can be bought many places, yeah, you can typically go out
21 and find it someplace else. But in this case, it's
22 difficult. This is a difficult specific width and gauge
23 combination.

24 Q. You've been -- over 11 months, you've been worried about
25 a shutdown of Nissan?

11/29/04

Witness: J. Tessier

1 A. No, that's not correct. Whenever we got the letter from
2 Heidtman that they were going to shut us down, which would
3 have been September or October.

4 Q. Have you done nothing to try to find other qualified
5 material to deal with this risk, this single source of
6 supply?

7 A. No, we have not. We felt we had a supply that was firm,
8 steady, that was reliable.

9 Q. Do you have any kind of agreement with Steel Dynamics
10 that says they're going to make this steel next week?

11 A. No, I believe our agreement is with Heidtman.

12 Q. Right. I'm saying in terms of shutting down Nissan,
13 what have you done by way of a back-up plan? Anything at
14 all?

15 A. At this point, no, we don't. I mean, you'd have to look
16 world wide for this steel somewhere else. Maybe Nissan has
17 other opportunities. I don't believe they do.

18 Q. And you were worried about a shutdown 11 months ago,
19 weren't you?

20 A. On this particular part?

21 Q. Yes.

22 A. Not that I recall.

23 Q. Take a look at Exhibit 512 please. That's you, isn't
24 it, Jeff Tessier?

25 A. That's correct.

1 Q. Do you remember this letter?

2 A. Yes, I do.

3 Q. Do you remember sending it to Bob Millar?

4 A. Yes, I do.

5 Q. Can you read the last paragraph?

6 A. In the interim, our expectations are that you will
7 continue to supply per your release until the issue is
8 resolved with our customer. Failure to do so would result
9 in a customer shutdown situation. Should this occur, we
10 would have no course of action other than to debit your
11 account for any charges levied against us by our customer.

12 Q. Do you remember when that letter went out?

13 A. I believe it went out January.

14 Q. I just asked you that, didn't I? You were worried about
15 shutdowns as long as 11 months ago. What have you done to
16 find a backup for a supplier?

17 A. When this --

18 MR. SHARKEY: Objection, asked and answered.

19 THE COURT: He can answer.

20 THE WITNESS: First of all, it's a boilerplate
21 that went out to all of our suppliers for the exact same
22 reason, but at this time the 063 wasn't an issue because we
23 weren't going into production until August of 2004. There
24 were some other items that Heidtman had that we were
25 purchasing from Heidtman that they were requesting

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1 increases, and we were rebutting those increases, saying no,
2 we can't give you increases, we have to continue to give our
3 customers decreases, you know, we have a problem, that, if
4 you read through the rest of the letter, there's a program
5 at Fabco where our expectations and our supply base, their
6 annual productivity, gives back five percent a year price
7 reduction so that we can keep up with the price reductions
8 we give our customers. And I was reminding our supply base
9 of that, and Heidtman got this letter, so did about 40 or 50
10 other of our suppliers, and that we were using this as a,
11 you know, notice out in the industry, that, listen, we're
12 not taking these increases; as a matter of fact, we expect,
13 our expectation is decreases to keep pace with the OEM's.
14 And again, at this time, we weren't production on that. I
15 wasn't worried at that point. We hadn't got a price
16 increase request from Heidtman on this particular steel yet.

17 Q. You're buying 044, 055, 193, 153, 063 in two different
18 widths, all on the same purchase order?

19 A. That's correct.

20 Q. Anything anywhere that says I really care about the
21 063 --

22 A. No, it was a general boilerplate.

23 Q. When you wrote to Heidtman and said we're not going to
24 take any price increases in January, correct? Take a look
25 at Exhibit 513. It's a reply to your letter, sir. Do you

1 remember it?

2 A. Uh-huh, yes.

3 Q. You were told that the price increases will go into
4 effect, is that correct?

5 A. I believe on this particular part number that Heidtman,
6 it wasn't a price issue, it was an issue of supply, that
7 they could not find this type of material. Again, it was a
8 specialty type steel with a wide width.

9 Q. Do you want to read 513?

10 A. And they couldn't supply it at all anyplace else.

11 Q. Read 513.

12 A. I'm sorry, I'm on 514. Okay. I apologize.

13 Q. Heidtman said no, the price increases will go into
14 effect, isn't that what it says?

15 A. It's saying we had to, yeah, we had to -- they wanted
16 them to go into effect, we had to sign an agreement to pay
17 surcharges.

18 Q. Okay. And do you place orders after you receive that
19 letter?

20 A. I don't believe we placed any new orders, no.

21 Q. You don't think you placed -- your purchase order is
22 dated, this is Exhibit 509 and 510 that the court was just
23 looking at. And I'm telling you, Mr. Tessier, on
24 January 14, a week later, Heidtman writes to you by name
25 directly and says we are raising prices. This is within

1 days of your January 7 purchase order. You write back
2 shortly thereafter, judging from the facts, looks like maybe
3 January 23, said we're not going to accept any price
4 increases. You're told on January 27, you will accept price
5 increases. Isn't that what the correspondence shows?

6 A. I'm sorry, Mr. Carey, I'm having trouble following you
7 here.

8 Q. Well, the suggestion has been that you were somehow or
9 other surprised by price increases in view of your long term
10 purchase order. I'm saying your purchase order that comes
11 closest to the material at the time is January 7, you get a
12 letter a week later saying here's the new pricing, you say
13 no, Heidtman says yes. Exhibits 510, 511, 512, 513.

14 A. Okay.

15 Q. By the time you got to 513, was it your impression that
16 Heidtman was going to charge the surcharges, or not?

17 A. Well, it's my understanding they want to. But yeah,
18 they want to impose surcharges, that's correct.

19 Q. Did you place orders?

20 A. We did not place new orders, no.

21 Q. You didn't place any orders during January and February
22 and March?

23 A. Oh, material order releases?

24 Q. Yes.

25 A. There was likely releases for some different -- because

1 there's different size here. I don't believe any orders
2 were placed for the 063.

3 Q. What's special about 063? There's nothing in this
4 correspondence that mentioned 063. Your January 7 purchase
5 order lists seven different items.

6 A. Uh-huh.

7 Q. Why would anybody pay attention to 063 especially?

8 A. At that time, in January, I would say that we were
9 rejecting increases against all items at that point.

10 Q. But then when you were invoiced at the higher prices you
11 paid them, didn't you?

12 A. Specifically on every one, I can't say, but I know for a
13 fact that we rejected these, and that we did not pay -- in a
14 lot of cases on this stuff we did not pay the increases. We
15 paid the contract price until such a time that Heidtman said
16 that we were short paying, and we said no, we weren't.

17 Q. And then you paid, though, didn't you?

18 A. Only under duress once they sent us stop shipment
19 letters. Actually, not letters, but actually shipments
20 didn't arrive at the plants, and I refer back to what I had
21 mentioned earlier was that, at that time, I had to make a
22 decision whether to pay the increase or shut the customer
23 down, and I agreed to the increase only to keep the customer
24 in product.

25 Q. Well, in January, you already told Heidtman you were

1 concerned about a shutdown at Nissan when they told you they
2 were going to raise prices. You continue to buy steel.
3 They ship the steel, you use up the steel. How is that any
4 different from where you are right now other than you don't
5 like having to pay the price for the steel?

6 A. We're at a point where, at that time, we agreed to keep
7 our customer in product, but at this point now, enough was
8 enough. We felt that we had been more than fair, and I
9 think at this time, it was really, enough was enough.

10 Q. Did you know what Heidtman was paying Steel Dynamics for
11 the steel?

12 A. I'm not in possession of their costing information.

13 Q. If their prices were going up --

14 A. My question about Heidtman is why don't you guys have a
15 fixed contract with Steel Dynamics, knowing that this
16 program was a Nissan-specific program starting model year
17 2005, and going out three to five years as a minimum. This
18 is -- and this is a requirement in the automotive industry.

19 Q. So this is a fairness issue as far as you're concerned?

20 A. I'm not quite sure what the question was.

21 Q. At this point now in January, late January and going
22 into February, you know the prices are going to continue to
23 be increased, don't you?

24 A. Well, the dynamics of the industry was growing and
25 growing. Really, January is when it kind of started, so it

1 was all kind of new to us really. The price increases had
2 taken a lot of people by surprise, myself included.

3 Q. But everybody in the business understood that was the
4 trend, correct?

5 A. In January, it was the beginning of a trend. No one
6 knew how long or how far at that point.

7 Q. Well, again, as you say, Heidtman you say should have
8 locked up a long-term price with Steel Dynamics because you
9 thought this was a five-year contract based upon an invoice
10 from 2003, or the purchase order. Why didn't you sue us in
11 January if, if you thought you had a long-term, fixed price
12 contract and you thought from your own correspondence there
13 was some risk of shutting down Nissan? Why do you wait 11
14 months?

15 A. I guess we just didn't exercise that right at that
16 point. Like I said before, we were all hoping in the
17 industry that this was short lived and this wasn't going to
18 continue, but once it continued and continued, we had no
19 other choice. I mean, I had to get steel into the -- this
20 is a brand new vehicle launch. It's very important to our
21 company. Nissan is our number one customer, and we could
22 not jeopardize that. So I had to somehow secure the supply
23 to our plant so that we could continue to ship product to
24 Nissan. So that is why we've done what we've done,
25 basically. Simple as that.

1 Q. Do you think Heidtman broke its promise or contract in
2 January by upping these prices beyond the purchase order?

3 A. I believe, yes.

4 Q. Why do you keep on doing business with us?

5 A. I believe they're a good supplier. Always quality in
6 delivery. Never been an issue. Up until now, their prices
7 have held firm. They've been a decent supplier. I would
8 consider them an approved supplier within our system.

9 Q. You said a little bit ago, you could buy this material
10 from Steel Dynamics because --

11 THE COURT: Okay. Let's move on.

12 BY MR. BOHMER1:

13 Q. Do you issue new purchase orders every time Heidtman
14 raises the price?

15 A. I believe the purchase orders were amended and reprinted
16 and sent, yes.

17 Q. Do you have copies of them?

18 A. Yes, we would have copies.

19 Q. For every price increase?

20 A. Any change amended to a purchase order would have been
21 printed and faxed, mailed, put on file at Fabco.

22 THE COURT: That was a question I asked you
23 earlier. I just saw the one, the July, I saw the January,
24 then July, and then September, but you agreed to more than
25 one change in the price along the way. So where are the

1 other purchase orders?

2 THE WITNESS: The other purchase orders would be
3 any time you would change the purchase order on some of the
4 other part numbers, I believe the only change was in April
5 on this, on this particular part number. We only changed it
6 once. It was always 297, and then it went to .3585. Do you
7 mean for every single part, or just this one?

8 THE COURT: Well, I'm not clear what the
9 question is then. I mean, are we only talking about this
10 one part?

11 THE WITNESS: Yes, ma'am.

12 THE COURT: Okay. Then, so the only change
13 order that talked about a change in price that I saw, and I
14 don't remember which one it is now, was the one in July.

15 MR. CAREY: 532.

16 MR. SHARKEY: I believe that was the next after
17 the April price increase. I don't want to speak for
18 Mr. Tessier.

19 THE COURT: Where's the April one?

20 MR. SHARKEY: April is an internal note. That's
21 why we missed it, frankly. The last Page of 109, if you
22 read that, it says note, 4/19, 2004, price change from 297
23 to 3585, and then you got to read the very next page which
24 says April first.

25 And I don't know what Mr. Tessier did, his

1 office, in terms of issuing a PO, if there was one issued in
2 April or July or not.

3 THE COURT: All right.

4 THE WITNESS: I believe, Your Honor, that this
5 is the only change that we made to that particular part
6 number was in April.

7 THE COURT: That increase to .3585?

8 THE WITNESS: That's correct.

9 BY MR. SHARKEY:

10 Q. And then there's a July change with the handwritten
11 notes on it. That's 532, saying per email, July 2004
12 prices, 4785.

13 A. That handwriting is from Bob Millar of Heidtman. We
14 sent this to him. I think what's changed here, if you read
15 the --

16 THE COURT: Says coil width change only.

17 THE WITNESS: That's correct. And I was
18 alluding to earlier, what my buyer has done is he took the
19 April line item, which is Number 70, canceled it, and
20 created line item 150 for this one, saying just the width
21 change, okay. We're getting closer to production, our tools
22 are finished, this is the final developed size, what we
23 call -- which would be what will be going into production.
24 Earlier, you got subtle changes here there, until you get it
25 just down to, until it's tweaked to just where you want it.

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1 Then you update your purchase order for the ongoing, final
2 size on that.

3 THE COURT: There's no response from Fabco,
4 though, saying, you know, no, we disagree about the
5 July 2004 price, right?

6 THE WITNESS: I would disagree with -- well, I
7 believe we responded, Your Honor. I'd have to look here,
8 but I'm pretty certain that my guy informed Heidtman that we
9 weren't accepting price increases.

10 THE COURT: Have any idea where that might be,
11 Mr. Sharkey?

12 MR. SHARKEY: Your Honor, I want to make sure
13 the Court understands what 532 is. This is their exhibit.
14 They hand wrote on the PO, and it's Mr. Millar, Bob Millar
15 of Heidtman saying per email, we have a higher price. The
16 email is his own email. I mean, it's just -- so that could
17 have been written any time. I'm not saying it was, it could
18 have been written a week ago. We have no idea when this
19 thing was written.

20 THE COURT: You're saying it was not
21 communicated to Fabco?

22 MR. SHARKEY: I'm quite certain it was, probably
23 vociferously, and Mr. Tessier can talk about the response.
24 But these guys are talking on the phone a lot, too, it's
25 mostly a phone and email thing, where, no way, we're not

1 paying you, going back and forth.

2 MR. CAREY: You can see it was sent to Tom
3 Staddon, at the top of 532, to his attention.

4 MR. SHARKEY: I just don't know when Mr. Millar
5 wrote, hand wrote this in, and said based on my e-mail from
6 about a month ago, we want a higher price. And I see what
7 Mr. Carey is saying which is it was sent back to Mr. Staddon
8 saying, hey, we want this 47 cents, and I think we covered
9 this in the affidavit, but we did respond. The
10 telecommunications, here's Exhibit D to the verified
11 complaint which would be 104, here it is. June 28, how many
12 days later is that, four days later? Page, Exhibit 104,
13 ma'am, right in the middle there. There's an email from Tom
14 Staddon to Bob Millar. That's Monday, June 28. They sent
15 us this thing, an email saying we want a higher price on
16 Thursday. The following Monday, Bob, please be advised that
17 Fabco is not accepting price increases at this time, however
18 we expect you to keep shipping, blah, blah, blah, Tom.

19 THE COURT: All right. Okay.

20 BY MR. CAREY:

21 Q. The judge asked one of the questions is you can
22 apparently -- your internal accounting system let's you, for
23 example, show a price change of April 1 without actually
24 generating a document that Heidtman ever receives; correct?

25 A. Yeah, that would be correct.

1 Q. Okay. And Exhibit 109 are some printouts from your
2 system, and I think they're intended for the proposition
3 that every part number in your system should match up to a
4 purchase order. Isn't that right?

5 A. These are, these documents in 109 are basically screen
6 dumps of the purchase order. These are the same line items,
7 that's correct. They're off the purchase orders.

8 Q. Can you find me the part that you're talking about on
9 this printout --

10 A. 109, first page.

11 Q. -- or any of them?

12 A. I see them, Line 80.

13 Q. 6354875.

14 A. I see it on Line 70 and 80. Yes, that's correct.

15 Q. Which one?

16 A. 70 and 80.

17 Q. Neither of those are 875, are they?

18 A. They are not. At the time, developed varying in prices.

19 Q. But this was developed on February 19.

20 THE COURT: I've got to tell you, this is a
21 losing argument for you. I'm very satisfied that this part,
22 even though there are a little differences in the width, is
23 the same thing, and that's what we're talking about here
24 today.

25 MR. CAREY: I'm sorry. My point is, Your Honor,

1 no, this system doesn't even know about 875 part, it doesn't
2 know about the purchase order. You obviously buy and price
3 without communication by purchase order, you know, and this
4 was offered up as proof that, my gosh, we can't even pay a
5 bill without having this particular part in our system. Of
6 course they do, and of course they place orders without
7 having parts like this in the system, and of course they
8 modify prices without sending new purchase orders.

9 THE WITNESS: I would disagree with that. We
10 modified price, we sent out purchase orders to our
11 suppliers.

12 MR. CAREY: No, I understand, and it's not my
13 suggestion at all that this is the 63 material that they use
14 for this part, religiously following some written process of
15 procurement by purchase order, and nothing to be paid unless
16 we have a purchase order. The record is replete that they
17 do business by email and by telephone and by releases.

18 BY MR. CAREY:

19 Q. You will agree with me, you were told during January if
20 you don't pay the prices, Heidtman won't ship. You were
21 told that again in June, correct?

22 A. I believe those dates to be approximate, yes.

23 Q. Told in July, told on August 11. Now, after those four
24 circumstances, did you continue to place new orders with
25 Heidtman for steel?

1 A. New orders, releases?

2 Q. New releases, sir.

3 A. Releases, yes.

4 Q. And you were invoiced at the prices that you were quoted
5 each month, correct?

6 A. Yes, I believe that's correct.

7 Q. And you paid those invoices, correct?

8 A. Not at first we didn't. Then when Heidtman said they
9 would discontinue shipping if we didn't pay their increased
10 demand as opposed to the purchase order price, then we paid
11 it. As a matter of fact, I remember Bob Millar came in and
12 hand delivered a check to Bob Millar in the summer so that
13 we would get our steel for the variance of what they gave us
14 and what was on our purchase order.

15 Q. So when you came into the courtroom on November 9 and
16 told this court that you were in the midst of a crisis, what
17 was different on November 9 from January or June or July or
18 August other than you were receiving monthly invoices of
19 prices higher than you wanted to pay, and if you were short
20 paid, you were told if you don't pay our bills, we won't
21 send you the steel?

22 A. I don't believe it was any different. The same
23 situation arose as we were placed in production. The same
24 argument came up again that, you know, Heidtman wanted X
25 number of dollars, and Fabco felt we had a contract at Y and

1 again, I can only go back to saying that at that point,
2 basically enough was enough, this had escalated to a point
3 where it was getting very serious.

4 Q. On this Exhibit that you're most concerned about, this
5 Exhibit 101 from September, anything in your file that would
6 show that it was uncommunicated to Heidtman at all?

7 A. I'm sorry, Mr. Carey, could you repeat the question?

8 Q. Sure. You have the September 23 version of the purchase
9 order? It's Exhibit A to your complaint. It's I think
10 Exhibit 101. It's your most, arguably your most recent. I
11 can't testify, but I'll ask you to consider the possibility
12 that Mr. Millar of Heidtman has copies of, had copies of all
13 of these PO's, including the kind of mangled one from
14 January that's hard to read, has no copy of that in his file
15 to his knowledge at the time of the complaint. Do you have
16 any way of saying that that was communicated to Heidtman in
17 any way?

18 A. This is the same purchase order that was given to them
19 in April, Mr. Carey. Quite frankly, this is the same price
20 on the same part number. They would have got this in April.
21 The changed status, 9/23. I'm not sure. That could have
22 been something very well we printed, it could have been
23 printed on an additional copy print which would make the
24 same status, 9/23. I believe this here was the April
25 purchase order.

1 Q. So you're not surprised if you wouldn't have that?

2 A. Oh, yeah, if nothing --

3 Q. Is this the April purchase order?

4 A. I believe so.

5 THE COURT: What's the number of the April
6 purchase order, what exhibit?

7 THE WITNESS: 521 I think. No, I'm sorry. I'm
8 sorry, Your Honor. I don't remember.

9 THE COURT: Mr. Sharkey, do you have it?

10 MR. SHARKEY: No, Your Honor. I don't see an
11 April PO. We've got the 109, which is the indication of the
12 price increase, but I don't see one issued between April and
13 July which I think was 509, or somewhere in there. So
14 obviously we would have told Heidtman. I'm sure they were
15 happy at the time to get a price increase, but I don't know
16 if we have a PO to that.

17 The thing is, if you don't print one of these
18 that day, the system feeds over itself. And Mr. Tessier can
19 talk about this. But you sort of lose the chance forever to
20 go back to that day. In other words, we couldn't print an
21 April 2004 PO because it will automatically read November of
22 2004.

23 THE COURT: Well, let's just use the July one
24 which is 532. Is there any difference between the July
25 purchase order and the September purchase order?

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1 THE WITNESS: No, ma'am, I do not believe there
2 is. There shouldn't be.

3 THE COURT: Is it possible that the last one
4 that was sent to Heidtman was the July one?

5 THE WITNESS: It's quite possible. That's, if
6 you see on the, 532 on the left-hand side, Your Honor, it
7 says 150 new. That would have been superseding the other
8 previous line. This is the final developed size so that the
9 width changed a bit, and we send this out, and this is the
10 new final one. So that could very well be the very last
11 one, yes. If you look at the bottom, faxed was a total of
12 two pages. You got to look at that little footer at the
13 bottom of the exhibit. I'm directing you to Exhibit 532.

14 THE COURT: I see it. It's fine.

15 MR. CAREY: Could we take a -- do you want to
16 break for lunch? Because I think I'm done. I'm more likely
17 to be done if I can think about it, rather than trying to
18 stand here.

19 THE COURT: Yeah, we could break for lunch.

20 MR. SHARKEY: On this point, I think what
21 happened is they just printed this one up for me. I don't
22 want to interject testimony, but I think I said I want the
23 PO, and they said we'll print it up. I remember this thing
24 starting about late September, the first go round. So 532
25 and 101, I should have used 532, I may not have had it.

1 THE COURT: They look the same to me.

2 MR. SHARKEY: If you wanted it put it to bed.

3 THE WITNESS: I believe that to be the case,
4 that I don't believe we would have made a change after this
5 date.

6 THE COURT: I think I have -- let's just start
7 again at 2:00.

8 (Lunch and recess were taken 12:40
9 until 2:10 p.m.)

10 MR. CAREY: Your Honor, I don't have anymore
11 questions of Mr. Tessier.

12 MR. SHARKEY: Your Honor --

13 THE COURT: Yes?

14 MR. SHARKEY: I just want to ask Mr. Tessier one
15 follow-up. Can we sit?

16 THE COURT: I think it's just easier for the
17 court reporter if you use the podium.

18 BY MR. SHARKEY:

19 Q. Mr. Tessier, would you flip to 502, sir? I want to
20 clear up one thing from the cross examination. You
21 understand the Court's concern here that, guys, you keep
22 talking about this February 11, 2003 purchase order. I
23 don't see it. It's not in front of me. 502 is dated about
24 a month later, March 14, 2003. The bottom left-hand corner
25 there, that's Line 40, that's the part we've been talking

1 about, correct?

2 A. That's correct.

3 Q. And "new" means this is the first time that it's ever
4 been on a PO, correct?

5 A. That's correct.

6 Q. So if we were to go back, if you were to go back and get
7 the February 11, 2003 purchase order, I don't know if that's
8 possible or not because it's probably been trumped by the
9 computer, but would that have anything to do with the part
10 that is at issue here?

11 A. No, it would not.

12 Q. So the very first time that we order, and I understand
13 it wasn't in production yet, it was just a prototype, was
14 March 14, 2003, correct?

15 A. That's correct. That's why we updated that purchase
16 order to include that particular product.

17 Q. And did you ever get an objection from Heidtman as to --
18 starting on I believe it was Exhibit 510, the January 7,
19 2004 purchase order, did Heidtman ever object to you at any
20 time, hey, that wasn't the deal, we don't have a PO with you
21 through the end of this Nissan program?

22 A. No, I'm unaware of any objection to that PO.

23 MR. SHARKEY: That's all I have, ma'am.

24 THE COURT: I just have one clarifying question
25 because I'm looking at Exhibit 532 which is the July

1 purchase order, July status change.

2 THE WITNESS: Yes, ma'am.

3 THE COURT: That also says "new" at Line 150.

4 This isn't the first part that this part has shown up,
5 right? I mean, this is, again, a slightly different
6 dimensional version of the part that we see for the first
7 time in the purchase order dated 3/14/03.

8 THE WITNESS: That's correct.

9 THE COURT: So what does the "new" refer to
10 here, the different dimensions?

11 THE WITNESS: Yeah, what my guy has done here is
12 effectively he's canceled Line 40 and just issued Line 150,
13 new, with the new dimensions.

14 If you look, the other dimension is 54,
15 54.65 inches wide, and this one is 54.875 inches wide, so
16 the only difference is that nominal amount of width. It's
17 the exact same.

18 So instead of changing Line 40, what he does is
19 cancels that and just issues a whole new line item, but it's
20 for the same part.

21 THE COURT: Okay.

22 MR. SHARKEY: Your Honor, I'm going to rest. I
23 just want to repeat on the record.

24 THE COURT: Let me ask Mr. Carey if he has any
25 additional questions.

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1 MR. CAREY: No other questions, Your Honor.

2 MR. SHARKEY: We had an agreement off the
3 record, put on the record, that all the exhibits for both
4 sides are admitted without objection in this hearing. Is
5 that --

6 MR. CAREY: Yeah, although I will say, just
7 before we broke at lunch, there seemed to be some question
8 as to whether 101 wasn't simply printed for you for exhibit
9 purposes.

10 THE COURT: Well, I'll take it for what it is.

11 MR. SHARKEY: At lunch I talked to
12 Mr. Yatzic(ph), ThyssenKrupp house counsel, and he said hey,
13 late September I asked them to print that out for me and I
14 sent that to you, Dan. So I don't think they ever got the
15 September 23 version of the PO.

16 THE COURT: I understand that.

17 MR. SHARKEY: Okay.

18 MR. CAREY: And Your Honor, with that
19 understanding, yes.

20 MR. SHARKEY: The only other thing, and then I
21 will sit down, is if the Court wants, we can give you front
22 and back of every single one of these PO's, they all have
23 our terms and conditions on them.

24 THE COURT: Unless someone has something else to
25 say about it, I accept Mr. Tessier's representation that

1 it's the standard language that appears on the backs of all
2 the purchase orders.

3 MR. SHARKEY: Then I don't, and the plaintiff
4 rests subject to its ability to call Mr. Boyce if the
5 financial issues arise on defendant's case.

6 THE COURT: All right. Thank you. You may step
7 down.

8 (Witness Tessier excused 2:15 p.m.)

9 THE COURT: Mr. Bohmer?

10 MR. BOHMER: Bob Millar please, M-i-l-l-a-r.

11

12 **ROBERT MILLAR,**

13 hereinbefore called as a witness, being first duly sworn
14 by the Court to tell the truth, the whole truth, and
15 nothing but the truth, was examined and testified upon
16 his oath as follows:

17 (2:16 p.m.)

18 **DIRECT EXAMINATION**

19 BY MR. BOHMER:

20 Q. Could you please state your name for the record?

21 A. Bob Millar.

22 Q. Are you employed?

23 A. I'm employed by Heidtman Steel.

24 Q. How long have you been with Heidtman?

25 A. In my 15th year.

1 Q. And what is your position?

2 A. I'm the Canadian salesman.

3 Q. As a Canadian salesman, what do your duties entail?

4 A. Well, I call on all the Canadian stampers. And I say
5 Canadian salesman, it's basically Ontario. I do have some
6 accounts outside the province of Ontario, but mainly because
7 of, you know, the area, I call it Ontario and Windsor and
8 Toronto are the big areas.

9 Q. Is there a reason why you deal principally in Canada?

10 A. Well, that's what I was hired to do. I'm a Canadian,
11 and to have a home boy, you know, call on your fellow
12 Canadians, if I don't like their prime minister, if I state
13 that, they don't get too upset with me.

14 Q. Have you ever had a dealing with ThyssenKrupp Fabco?

15 A. Oh, sure.

16 Q. If I use the term Fabco --

17 A. Oh, Fabco, yes, Fabco, I've known Fabco for years.

18 Q. And what relationship did you have with Fabco as the
19 Canadian sales rep for Heidtman Steel?

20 A. Oh, I thought I always had a good relationship with
21 them.

22 Q. Were they one of your accounts?

23 A. Oh, sure, good customer, sold them a lot of steel.

24 Q. Who do you principally deal with?

25 A. Tom Staddon.

1 Q. And you understand him to be a Fabco employee?

2 A. Yes, he's the buyer, steel buyer.

3 Q. Now, in the interest of time, I will try to get, I'm
4 going to take you through a series of exhibits, Mr. Millar.

5 A. Okay.

6 Q. If you can start by turning to Exhibit 502. Should be
7 the second document there.

8 A. Okay.

9 Q. These are sequential, so we'll go quickly as I can, but
10 particular to the order in which they're presented, what is
11 Exhibit 502?

12 A. That's the purchase order for some 044, 055, 043, 064
13 and-a-half, and that's basically it.

14 Q. Okay. And if you look at it, what is the purchase order
15 number? And I'll ask you to look at the top of both pages
16 of this exhibit to give me the purchase order number.

17 A. S100-158.

18 Q. Can you look at the second page.

19 A. Yeah, it the same thing.

20 Q. Thank you.

21 And this is dated March 14, '03 but references back
22 to a February 11, 2003 purchase order. Do you see that?

23 A. Yes, I do.

24 Q. Did you ever see a February 11, 2003 purchase order to
25 your knowledge?

1 A. February 11, 2003, yeah, I would say yes, I have.

2 Q. Do you know where that is today?

3 A. A copy, it is probably attached to the write-up to, you
4 know, to order the material.

5 Q. I see an expiration date of December 31, '39. Do you
6 see that?

7 A. Yes, I see that.

8 Q. Did you ever, when looking at any invoice from Fabco,
9 have occasion to question Fabco about those dates?

10 A. I questioned the date 12/31/39 somewhere in the last two
11 years, I can't be exact, and I was told that it was
12 something to do with their computer and I didn't have to
13 bother with it, so obviously I didn't pay any attention to
14 it from that time forward.

15 Q. Looking at Exhibit 502, at the top has your name, two
16 pages, Tom. Do you see that?

17 A. Uh-huh.

18 Q. You have to say yes or no.

19 A. I'm sorry, yes.

20 Q. Was it your understanding -- strike that. How did you
21 respond to these purchase orders?

22 A. By fax.

23 Q. Do you maintain a file for each of your customers on
24 these particular orders?

25 A. Yes.

1 Q. And do you have anything other than fax copies in your
2 file?

3 A. No, I do not, to my knowledge.

4 Q. If you look at Exhibit 504, again, this appears to be
5 another purchase order?

6 A. Uh-huh.

7 Q. Or at least another version of it?

8 A. Yes.

9 Q. What is the purchase order number on this purchase
10 order?

11 A. S100158.

12 Q. Is that the same as Exhibit 502?

13 A. That is correct.

14 Q. Does it also have the 12/31/39 expiration date?

15 A. Yes, it does.

16 Q. And when is this particular version of the purchase
17 order dated?

18 A. It was dated 2/11/03.

19 Q. Excuse me, that's the PO date.

20 A. I'm sorry, 5/13/03.

21 Q. Does this appear that this one was also faxed to you?

22 A. Yes.

23 Q. If you look down at the body of this particular status
24 change, it says Line 70, can you see where it says, it says
25 this blanket purchase order line supersedes and cancels line

1 40 in its entirety?

2 A. Yes.

3 Q. What would that mean to you as a salesperson for
4 Heidtman Steel looking at this purchase order?

5 A. Well, I would look at the other purchase order that I
6 had received, and change, make the changes to Line 40.

7 Q. Okay. Is it ordinary that if a change comes in on a
8 purchase order from Fabco that they would issue, for any
9 change whatsoever, something that would say here's our
10 change, this is what's --

11 A. Yes.

12 Q. -- different?

13 A. Yes.

14 Q. And you do need to wait until I finish my question.

15 A. I'm sorry.

16 Q. You did it again.

17 So this is where you would look for changes to any
18 purchase order.

19 A. Yes.

20 Q. So if there was a change in quantity on a different
21 purchase order, you'd expect to find it here.

22 A. Well, they don't have quantities on the purchase order.

23 Q. I'm talking in general.

24 A. Oh, in general, yes.

25 Q. A specification of a particular type of steel.

1 A. Yes.

2 Q. Would that include any piece of information to be found
3 on the purchase order, you'd expect the change to be found
4 in the body indicating the change?

5 A. Yes.

6 Q. Again, you've already indicated that this was faxed to
7 you. It appears that it is a two-page fax.

8 A. Yes.

9 Q. When you received these purchase orders from Fabco, to
10 your knowledge was there ever a third page or fourth page
11 with terms and conditions or something on it?

12 A. Not to my knowledge.

13 Q. If you can now turn to Exhibit 506. For the record,
14 this appears to be an email with some handwriting.

15 What are we looking at here in Exhibit 506, if you
16 know?

17 A. Excuse me, I was reading it and I --

18 Q. Oh, sure. Are you completed with your reading of it?

19 A. Yes.

20 Q. What is Exhibit 506?

21 A. It's the 063 material at a slightly wider, slightly
22 narrower.

23 Q. Okay, and --

24 A. -- width.

25 Q. And it notes, and I'll read for the record, Bob, please

1 provide cost and timing to provide the following tool
2 development steel, and then it has the 06354.800. Did I
3 read that correctly?

4 A. Yes.

5 Q. When you received this, what was your understanding of
6 why you were asked to look at this?

7 A. They were changing the width of the material that they
8 had originally ordered.

9 Q. And they were asking for what?

10 A. Excuse me.

11 Q. Please --

12 A. They were asking me if we could supply the narrower
13 width material and how quickly could we supply it so that
14 they could try it out.

15 Q. Did they ask about what the cost might be?

16 A. Well, doesn't say there, so obviously they didn't.

17 Q. If you look up at the very first paragraph, the part I
18 read into the record, and reread that please.

19 A. Oh, excuse me, please provide cost and timing. Okay.

20 Then I wrote a note down there, 8/11/03, advised
21 Tom Staddon via phone (email down). He will want week of
22 9/1/03. So I must have advised him of the price and
23 delivery date.

24 Q. So he did ask for a price?

25 A. Well, yeah, says that up there, yes.

1 Q. They asked whether there would be a different price?

2 A. Yes.

3 Q. For the --

4 A. Yeah, yes.

5 Q. If you can turn to Exhibit 507, and again I'll ask you
6 to look at the top. This appears to be another purchase
7 order version. Which purchase order does this one
8 reference?

9 A. S100158.

10 Q. Is that the same as the prior versions we've looked at
11 today?

12 A. Yes.

13 Q. And again, this appears to be a status change of
14 August 11, 2003?

15 A. Yes.

16 Q. And, again, this version has an expiration of
17 December 31, 2039, correct?

18 A. That's correct.

19 Q. Does this one, like the other ones, appear to be
20 something that was faxed to you?

21 A. Yes.

22 Q. And can you tell how many pages were faxed to you?

23 A. It looks like it says Page 1 of 2 and 2 of 2, so I'd say
24 it was two pages.

25 Q. Okay. Looking at Exhibit 508, and I'll ask you again,

1 this is another version of a purchase order. I'll ask you
2 to look at the purchase order number at the top of both
3 pages, and let me know, what is the purchase order that this
4 is referencing?

5 A. It's referencing S100158. I'm going to say it's 58.
6 It's tough to read, but that's what I'll say it is.

7 Q. So if there has been some confusion off the first page
8 that this might be S100159, it could be due to the
9 difficulty of reading this?

10 A. Yes, I think so.

11 Q. Looking down at the material that is being ordered, 193
12 and 153 material, do you remember this type of material
13 being discussed?

14 A. Yes.

15 Q. And in fact was this type of steel ever ordered?

16 A. Yes, it was. It was brought into our plant.

17 Q. And again, if you look down -- strike that. And again,
18 if you have S100158 as the purchase order, this is some of
19 the material purchased for this particular series of
20 purchase orders.

21 A. Yes.

22 Q. If you can go to Exhibit 510.

23 For the record, this appears to be another purchase
24 order. Is the purchase order the same as the ones we've
25 been talking about?

1 A. Yes, it is.

2 Q. And what is the date on this particular version of the
3 purchase order?

4 A. 1/7/04.

5 Q. Do you remember how you received this version?

6 A. Yes, I went into Fabco, and what I wanted was the
7 tonnage figure so that we could order steel for the items,
8 and I went in, and Mr. Tom Staddon printed it out for me and
9 gave it to me.

10 Q. This wasn't presented to you by Fabco as a new purchase
11 order?

12 A. No, it was just to write the tonnage figures down
13 without having to hand write them all. It was given to me.

14 Q. So you asked that this be printed out so you could do
15 your handwritten notes on it?

16 A. Yes. I didn't ask for it to be printed out. I was
17 asking for the tonnage, and Mr. Tom Staddon printed it out
18 for me, and I wrote the tonnage figures on it.

19 Q. So that would -- strike that. So this particular
20 version was never faxed to you?

21 A. Now, it could have been -- this particular one here was
22 not faxed to me, no.

23 Q. Again, because you requested it in --

24 A. Yes.

25 Q. -- person?

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Witness: Robert Millar

1 A. Yes.

2 Q. -- at Fabco?

3 A. Yes.

4 Q. Are you aware of a change in pricing that Heidtman and
5 other companies received sometime in the last year or two
6 from the mills?

7 A. Well, we receive them monthly.

8 Q. Okay. Is there anything that caused it to be in need of
9 being addressed sometime say in January of this year?

10 A. Yes, because we were being charged surcharges by the
11 mill because of the scrap shortages, the steel surcharges on
12 scrap.

13 Q. Okay.

14 A. And we were passing them along, plus the mills were
15 increasing our extras, which they hadn't done in the past,
16 and we were forced to pass those along.

17 Q. What are extras?

18 A. Well, if you take this product here, it's a high
19 strength, an 80 gauge material, and there's a large extra on
20 that, what they call a grade extra, and in the past, we were
21 getting it from the mill, and the mills, because they want
22 to move steel, they haven't been charging us the full
23 extras, and come January, it was like no holds barred, they
24 were charging for everything, whether it was gauge and width
25 or grade of material.

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Witness: Robert Millar

1 Q. How would you characterize steel prices, to the best of
2 your knowledge, now, during the year 2003? Were they in
3 flux, relatively stable, what were --

4 A. Well, excuse me, I was talking over you.

5 If you take the middle of 2003, you know, I think
6 we were buying hot roll bands fairly inexpensively, and so
7 they were, prices were very, quite low, and come January
8 first, they just snowballed to where now they're probably
9 tripled.

10 Q. To your knowledge -- strike that. Did the increased
11 charges from steel mills also include surcharges of any
12 kind?

13 A. Well, they passed surcharges along to us, yes.

14 Q. If, to the best of your knowledge, Heidtman didn't pay
15 those particular surcharges to any particular mill, what
16 could happen to the supply?

17 A. They wouldn't give us any steel.

18 Q. If you look at Exhibit 511, I'll ask you to indicate
19 once you've had a chance to look at it, what this is.

20 A. That's just advising Fabco of the surcharges and the
21 passing along of the price increases, plus the terms being
22 net 30.

23 Q. Okay. And who did you address this letter to?

24 A. Mr. Tom Staddon.

25 Q. And this is Mr. Staddon of Fabco?

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Witness: Robert Millar

1 A. Yes.

2 Q. Okay. And did you send this letter just to Fabco?

3 A. Yes.

4 Q. Were there other letters or other --

5 A. I sent this letter to several of my other customers
6 also.

7 Q. So this wasn't a special letter?

8 A. Oh, no.

9 Q. Other than the heading of who it was going to?

10 A. No.

11 Q. If you look at Exhibit 512, have you ever seen Exhibit
12 512 before?

13 A. Yes. That was sent to me by Mr. Jeff Tessier.

14 Q. And this is, was sent to you approximately when?

15 A. The date was -- there's no date.

16 Q. It's undated?

17 A. It's undated.

18 Q. Was it in the same time period as Exhibit 511?

19 A. Yes, yes.

20 Q. If you turn to Exhibit 513, what are we looking at in
21 Exhibit 513?

22 A. That was sent by me to Mr. Jeff Tessier.

23 Q. In the last paragraph -- strike that. Was this in
24 response to what is Exhibit 512, Mr. Tessier's letter to
25 you?

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Witness: Robert Millar

1 A. I would say that it probably is.

2 Q. Okay. In the last paragraph, it seems to indicate that
3 if surcharges aren't paid that shipments would be stopped.
4 Is that a fair characterization of the final paragraph?

5 A. In a roundabout way, yes.

6 Q. Okay. How would you better characterize it?

7 A. I would say that it's telling them to be, you know,
8 instead of just saying we're not going to ship you anything,
9 it's just that, you know, we suggest that you sign this, the
10 surcharge form, and so that we wouldn't stop shipping.

11 Q. If after sending this, if Fabco in particular didn't
12 accept invoices for what the current market price was from
13 Heidtman, what would have happened?

14 A. Well, I would have had to contact my superiors and let
15 them know what the situation was.

16 Q. Okay. And what could happen?

17 A. Well, we could stop shipping.

18 Q. To the best of your knowledge, were steel products
19 shipped during the month of January 2004?

20 A. Yes.

21 Q. To the best of your knowledge --

22 A. To the best of my knowledge, yeah, yeah.

23 Q. Okay. And is it fair to assume that invoices were
24 generated for the steel that was shipped?

25 A. That's correct, yes.

1 Q. Okay. What price would have been indicated on invoices
2 from Heidtman Steel?

3 A. Well, in that time, of course, we were only shipping
4 against the 044 and the 055.

5 Q. Certainly. Let me break there for a second. You were
6 only shipping two types of steel at that time?

7 A. That is correct.

8 Q. On the same purchase order.

9 A. That is correct.

10 Q. Okay. So it's part of this purchase order.

11 A. Yes, it is.

12 Q. And beginning, let's say, in January of 2004, let's keep
13 it the relevant time period, and thereafter, what prices did
14 Heidtman invoice to Fabco?

15 A. We would -- from January first coming forward, we would
16 have invoiced the price that I had stated on the emails that
17 I had sent to Mr. Staddon about the price increases.

18 Q. And how often did you send an email to Mr. Staddon with
19 price increases or decreases, whatever they may be?

20 A. Yes, there was some decreases starting, I believe it was
21 February 1. Excuse me, January 28th, maybe, for February.
22 I'm not sure.

23 Q. And to the best of your knowledge, were Heidtman
24 invoices reflecting these increased prices paid in the
25 January/February time frame?

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Witness: Robert Millar

1 A. Yes, because as soon as those prices were relayed by
2 email to Mr. Staddon, the prices would be changed in our
3 computer system so that we billed the proper cost.

4 Q. If you look over to Exhibit 516, Mr. Millar, I believe
5 you just said a moment ago emails. This appears to be an
6 email. Do you recognize this?

7 A. Yes. It's an email I sent to Tom Staddon.

8 Q. Dated February 23, 2004?

9 A. That is correct.

10 Q. And what is the subject line?

11 A. Steel surcharges March 2004.

12 Q. Okay. And reading it in its entirety, it says, Tom, the
13 steel surcharge for TKA Fabco for the month of March 2004
14 will be five dollars per cwt. Is that hundred weight?

15 A. Yes.

16 Q. Please acknowledge acceptance for the surcharge by
17 returning e-mail. Do you see that?

18 A. Yes, I do.

19 Q. Did Fabco order release steel for the month of March?

20 A. Yes.

21 Q. And would Heidtman generate invoices for the steel that
22 was shipped?

23 A. Yes, we would.

24 Q. And what price would there be on those invoices?

25 A. There would be the current price plus the five dollars

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Witness: Robert Millar

1 surcharge.

2 Q. To the best of your knowledge did Fabco pay those
3 invoices?

4 A. Yes.

5 Q. Without complaint or discussion?

6 A. Well, they didn't acknowledge my email.

7 Q. Did they pay the invoices?

8 A. Yes.

9 Q. Did other customers, not Fabco, did they also not like
10 the surcharges or price increases?

11 A. No one likes price increases.

12 Q. If you look over at Exhibit 517, which for the record
13 appears to be another email from you to Mr. Staddon; is that
14 correct?

15 A. That is correct.

16 Q. And what's the date that you sent this?

17 A. March 1, 2004.

18 Q. And what was the purpose of this email?

19 A. Mr. Staddon had asked him what I thought the prices were
20 going up to in 2005, and I responded by -- and I'm sure
21 we're only interested in the 063, 54.65, 35.85 hundred
22 weight delivered plus a applicable surcharge.

23 Q. So this was --

24 A. It was an estimate, yes.

25 Q. And that was for this material, 35.85, delivered plus

1 surcharge.

2 A. That's correct.

3 Q. And again, you did this at Mr. Staddon's request?

4 A. Yes.

5 Q. If you look at Exhibit 518, and for the record, these
6 have been provided in the way in which they were kept. If
7 you look at the bottom, it appears that the email from
8 Exhibit 517 was the very last thing. This appears to be in
9 sequence, but I didn't want to change the order in which
10 these were presented.

11 Mr. Millar, look at Exhibit 518. Does this appear
12 to be another email from you to Mr. Staddon?

13 A. Yes, it is.

14 Q. And in response to Exhibit 517, again, assume for the
15 sake of this question that the last paragraph in Exhibit 518
16 is the very top of Exhibit 517 where you quoted the 063
17 material, the 193 and the 153 material, okay? Do you see
18 what I'm talking about?

19 A. Okay, yes.

20 Q. Okay. Can you tell on Exhibit 518, in response to your
21 estimated pricing done at the request of Mr. Staddon, what
22 was Mr. Staddon's response to you?

23 A. He says, What about the other items on this PO? Is it
24 safe to assume that the pricing did not change for them?
25 Please review and advise.

1 Q. So Mr. Staddon comes back and asks what about the other
2 items. What was your response?

3 A. Per our phone conversation of early today, effective
4 April 1, 2004, prices on the following two items will be
5 increased as will the steel surcharge. That's on the 044
6 and the 055 items.

7 Q. So in response to his request, you informed him of the
8 April pricing?

9 A. That is correct.

10 Q. Turning now to Exhibit 521. Hold on for a second, two
11 more questions on Exhibit 518. Is it safe to assume that
12 the month of April, product was released due to the, this
13 purchase order or the ongoing relationship between Heidtman
14 and Fabco and material was shipped?

15 A. That is correct.

16 Q. And at what price would Heidtman invoice at?

17 A. The current, the price that I had specified on the
18 email.

19 Q. Okay. Now to Exhibit 521. And for the record, this
20 appears to be another email. Is this another email from you
21 to Mr. Staddon?

22 A. Yes, it is.

23 Q. Dated when?

24 A. April 26, 2004.

25 THE COURT: I'm sorry, I was reading. I'm lost.

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Witness: Robert Millar

1 What are you referring to?

2 MR. BOHMER: Exhibit 521, Your Honor.

3 BY MR. BOHMER:

4 Q. So this is dated April 26, 2004?

5 A. Yes.

6 Q. And what was the purpose of this email?

7 A. To advise them of the price increase for May 2004.

8 Q. And it indicates that the items would be increased in
9 base price but that the surcharge would be reduced.

10 A. That is correct.

11 Q. Did the surcharges change over time?

12 A. Surcharges fluctuate, yes, they do, depending on the
13 price of scrap. It's based on scrap being \$170 a ton, and
14 currently I think it's \$410 a ton.

15 Q. And the surcharges, how do they relate to the charges
16 Heidtman is paying to the mill?

17 A. We pay the surcharge right along with everything else to
18 the mill.

19 Q. So it's pass-through?

20 A. Yes.

21 Q. In the month of May, 2004, did Fabco order steel coils
22 from Heidtman Steel?

23 A. Yes, they did.

24 Q. And did Heidtman Steel deliver coils?

25 A. Yes, we did.

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Witness: Robert Millar

1 Q. What price would Heidtman invoice that material?

2 A. The price is indicated on the email for May first, May
3 pricing.

4 MR. SHARKEY: We'll stipulate that they always
5 invoiced us at the price that they wanted and that they kept
6 shipping, shipping the whole time. That may help things go
7 along.

8 MR. BOHMER: Thank you.

9 THE COURT: Yeah, I don't really need you to go
10 through all of these invoices one by one.

11 MR. BOHMER: Okay. I was nearing the end, but I
12 will speed it up.

13 BY MR. BOHMER:

14 Q. If you look at Exhibit 522, and I just have a couple of
15 questions. This appears to be another email dated April 29,
16 2004. Is that accurate?

17 A. That is correct.

18 Q. And does this particular email, what were the prices set
19 for May of this email?

20 A. Well, I had given him the price for May on Exhibit 521,
21 which was 38.50 and 38.

22 Q. Okay.

23 A. And then in having conversation with our people, it was
24 considered that we could go and we could hold them, we
25 didn't have to increase the price in May, we could give them

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Witness: Robert Millar

1 the same price as we had in April.

2 Q. So you lowered your price.

3 A. Or we didn't raise our price.

4 Q. Okay. You lowered your price from your anticipated --

5 A. That is correct.

6 Q. And just very, very quickly, Exhibit 524 appears to be
7 an e-mail setting prices for June?

8 A. Yes, that's correct.

9 Q. And as was the case with the others, material was
10 ordered and material was shipped and was invoiced at --

11 A. That is correct, yes.

12 Q. At Heidtman's current prices?

13 A. Yes.

14 Q. Exhibit 526, and a very brief email, appears to be from
15 Mr. Staddon to you. In its entirety, Tom, Heidtman Steel
16 will need your company's decision on our June price
17 increases by tomorrow, June 11 '04, so that we can continue
18 to ship product to you and purchase material for future
19 releases. Did you in fact send this email?

20 A. Yes, I did.

21 Q. And why did you have to send this?

22 A. I was wanting to have them pay the prices that, you
23 know, that we had charged, price increases.

24 Q. And did they ultimately pay those price increases?

25 A. Yes, they did.

1 Q. Looking now to Exhibit 527, and I'll be very brief on
2 this. Looking again at the purchase order number at the top
3 of Pages 1 and 2, is this again the same purchase order that
4 we've been discussing?

5 A. Yes, it is.

6 Q. The two materials referenced, 193 and 153, do you
7 remember those materials being added new in this purchase
8 order?

9 A. Yes, I do.

10 Q. When you received this, did you make any attempts to
11 acquire material to fill this order?

12 A. Well, these are the items that we purchased the material
13 and brought it in to supply them.

14 Q. Okay. So based on this, you bought material?

15 A. Yes, we did.

16 Q. Looking now to Exhibit 529 which appears to be an email
17 to you from Mr. Staddon, is that correct?

18 A. That is correct.

19 Q. What did this email tell you?

20 A. It canceled those two items off our purchase order.

21 Q. Did they ask you if it was okay to cancel those two
22 items, or did they just do it?

23 A. No, they just did it.

24 Q. What did Heidtman do with the steel that they acquired
25 to fill these particular line items?

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Witness: Robert Millar

1 A. We were able to use it elsewhere.

2 Q. Sold it to another customer?

3 A. That's correct.

4 Q. Going back one exhibit to Exhibit 528, and ever so
5 briefly, is this email setting the July steel prices?

6 A. Yes.

7 Q. What was the July steel price for the 063 material?

8 A. I haven't -- oh, I'm sorry, 47.85.

9 Q. Okay. It says per hundred weight total.

10 A. That's right.

11 Q. I notice there's not a surcharge on that line item.

12 A. When I did the pricing, I incorporated the whole thing.
13 It was the first time I had done that one, and I
14 incorporated the surcharge within the total price of the
15 steel.

16 Q. So there was no surcharge at this time on that material,
17 because it was in the actual price?

18 A. It was in the actual total price, yes.

19 Q. Okay. Thank you.

20 Can you turn to Exhibit 530?

21 MR. BOHMER: May I approach, Your Honor?

22 THE COURT: You may.

23 MR. BOHMER: Thank you.

24 BY MR. BOHMER:

25 Q. Mr. Millar, I handed you what I believe was discussed

1 this morning. I believe it is Exhibit 104, and it appears
2 to be a series of emails.

3 A. Yes.

4 Q. Is that the -- can you compare that with Exhibit 530?
5 How do these two relate?

6 If I can speed it up, I'm just trying to establish
7 that these are the same, just two different --

8 MR. SHARKEY: So stipulated, Your Honor.

9 THE WITNESS: Yes.

10 BY MR. BOHMER:

11 Q. If you look at either version. It matters not to me
12 which one you look at. Do you remember hearing this morning
13 a conversation about you sending the steel prices and Fabco
14 not accepting steel price increases; that was their
15 response, Mr. Staddon's response?

16 A. Yes.

17 Q. One thing that was not mentioned this morning in that
18 discussion was what was your response to Mr. Staddon? Can
19 you read that into the record?

20 A. Tom, Heidtman Steel will be shipping and billing at the
21 new July prices. These prices will have to be paid so that
22 we can continue to purchase material for your account and
23 continue to ship without any interruptions.

24 Q. Okay. And you did forward this on to Mr. Staddon?

25 A. Yes.

11/29/04

Witness: Robert Millar

1 Q. And for the month of July, were invoices generated for
2 material shipped to Fabco?

3 A. Yes.

4 Q. And were those invoices paid?

5 A. I believe at the 063, I think that's when they did not
6 pay the price increase.

7 Q. Did they pay the price increase, to the best of your
8 knowledge, on the 044, the 055?

9 A. To the best of my knowledge, yes.

10 Q. Looking now to Exhibit 532, for the record, this appears
11 to be another version of the purchase order numbered
12 S100158; is that correct?

13 A. That is correct.

14 Q. And was this like all the others that you received, that
15 Heidtman received by fax?

16 A. Yes.

17 Q. And looking, it says at Line 150, new. Do you see that?

18 A. Yes.

19 Q. And it says 063 by 04.875. Is that the material we've
20 been talking about?

21 A. That is correct.

22 Q. And what was your response -- strike that. What was the
23 price that they proposed or that was at least indicated on
24 the front of Exhibit 532?

25 A. They put .3585 -- .3585 cents a pound on the --

11/29/04

Witness: Robert Millar

1 Q. Do you recall approximately when you quoted that price
2 to them?

3 A. Basically when I gave you, sent that email saying that
4 the prices would be .3585 with applicable surcharges back
5 in, I guess, February.

6 Q. So you forwarded this onto them with a response, did you
7 not?

8 A. I forwarded this onto them, yes, I did.

9 Q. What was your response?

10 A. It says, Per email 6/24/04, July 2004 price, is 47.85
11 cost delivered.

12 Q. At some point earlier on, you had quoted this material
13 at .3585 plus the surcharge, correct?

14 A. Correct.

15 Q. Here, you respond and say the total price is 47.85,
16 doesn't it?

17 A. Correct.

18 Q. So it's not completely an apples-to-apples comparison
19 because one includes, one does not include the surcharge --

20 A. I understand, yes.

21 Q. -- in the base price.

22 A. Yes.

23 Q. And who did you send this response to?

24 A. Mr. Tom Staddon.

25 Q. And after sending this back to Mr. Staddon, do you

1 recall ever seeing -- strike that. Did Fabco order material
2 of the 063 material?

3 A. Yes.

4 Q. And what price did Heidtman invoice it at?

5 A. We invoiced them at the price that we stated that we
6 were going to invoice them. They knew what the price as of
7 July and as of August would have been.

8 Q. Did you get anything back from Mr. Staddon after you
9 sent this to him saying, no, we don't think that's the right
10 price, or otherwise?

11 A. No, not to my knowledge.

12 Q. From your review of your file that you keep on, for the
13 Fabco orders, do you have in your possession any other
14 purchase orders that come later in time than this July 19,
15 2004 status change?

16 A. To the best of my knowledge, no.

17 Q. When this one was received, did you receive a third,
18 fourth or fifth page that included any other terms or
19 conditions?

20 A. No, sir, not to my knowledge.

21 Q. Looking at Exhibit 533, is this an email from you
22 setting the steel prices for August 2004?

23 A. Yes, it is.

24 Q. After accepting this, did Heidtman receive orders for
25 the delivery of more material?

11/29/04

Witness: Robert Millar

1 A. Yes.

2 Q. And did Heidtman invoice at the price we indicated?

3 A. Yes, we did.

4 Q. Looking at Exhibit 534, another email from you to
5 Mr. Tessier at this time. Excuse me, copy to Mr. Tessier.
6 It's Mr. Staddon, is that correct?

7 A. That's correct.

8 Q. And in its entirety, Tom, Effective today, August 11
9 '04, Heidtman Steel will halt all direct sales shipments to
10 TKA Fabco until all price increase or surcharges that were
11 deducted from invoices are paid in full. Do you see that?

12 A. Yes.

13 Q. Did I read that accurately?

14 A. Yes, you did.

15 THE COURT: Can we please move through this more
16 quickly? I mean, I can read, so I don't need him to read
17 these emails to me.

18 MR. BOHMER: I understand, Your Honor.

19 THE COURT: Please.

20 BY MR. BOHMER:

21 Q. After you sent this, did Fabco bring their invoices
22 current as of that date?

23 A. I would have to say, to the best of my knowledge, no.

24 Q. Did Heidtman continue to ship product?

25 A. Yes, we did.

1 Q. Did Heidtman continue, did you continue to send emails
2 to Mr. Staddon setting prices in the months that followed?

3 A. Yes, I did.

4 Q. Were there price increases and decreases?

5 A. Yes, there was.

6 Q. Did you hear the discussion between the 063, 64, 065
7 material?

8 A. Yes, I did.

9 Q. Can you explain very briefly the differences between
10 those materials?

11 A. Well, that's only a, that's like two thousandths between
12 the 063 and 065. The price really would remain the same
13 within that gauge range and also on the width because of the
14 small amount of decrease in the width. That would remain
15 basically, it would not affect the price at all either. So
16 there's really, there's not a whole lot of difference
17 between the items.

18 Q. Would you have to order different steel, if I came in
19 and said I want a 65 today and a 63 tomorrow, are they two
20 different coils?

21 A. Oh, absolutely, yes. But that's your minimum that you
22 could use. If they're asking for an 063 minimum, or let's
23 say they're asking for an 065 minimum, you certainly can't
24 ship an 064 or 063 because you're going to get coil
25 rejected. If they're ordering an 063, of course 064, 065

1 are within tolerance, certainly, and there's not a problem.

2 MR. BOHMER: No further questions at this time,
3 Your Honor.

4 (3:02 p.m.)

5 **CROSS EXAMINATION**

6 BY MR. SHARKEY:

7 Q. Good afternoon, Mr. Millar.

8 A. Good afternoon.

9 Q. Sounds like you went over to Fabco's shop and said, hey,
10 I want to figure out tonnage, and Staddon printed you up a
11 PO that you were just using as a reference basically?

12 A. I asked him for the tonnage that we were going to be
13 supplying on the various sizes so that we could order the
14 steel. He, for convenience for him, and I don't blame him,
15 he printed out the --

16 Q. Sure, just to have a list of everything.

17 A. Just to have a list instead of going through his
18 computer.

19 Q. Did you ever object to that or any of the subsequent
20 purchase order end dates of September 25, 2006? I think we
21 figured out this morning that it didn't have this 2039.

22 A. Well, I was told about the 12/31/39 date on the purchase
23 orders, I was told not to pay any attention to it. From
24 that time on, I never checked on the expiration date on the
25 purchase order.

1 Q. Did you know that Fabco was using this for the Nissan
2 Pathfinder, X-Terra program?

3 A. Yes, I did.

4 Q. Did you know what the life of that program was?

5 A. This is, we don't -- this is not a life purchase order.
6 If you have a life of the purchase order, you have to get,
7 just use the people that are involved. You have to get
8 Heidtman involved, SDI involved, Fabco involved, and Nissan
9 involved all together to say what your actual quantity, what
10 it is that you're going to be supplying, and everybody has
11 to buy into that program.

12 Q. But you don't object that you received, you received
13 these two, on January 7, going forward, you did receive PO's
14 and they did have the September 25, 2006 expiration date.
15 You're just saying that you didn't pay any attention to
16 them.

17 A. That is correct.

18 Q. We talked about the terms and conditions. You've seen
19 original PO's with the backs on them, correct?

20 A. I haven't gotten -- I've seen other PO's with the
21 originals, yes.

22 Q. From Fabco?

23 A. No, they fax their PO's to us.

24 Q. You've never seen --

25 A. To my recollection, they've always faxed them to us.

1 Q. Are you aware that the terms and conditions are attached
2 as Exhibit 1 to your lawyer's brief?

3 A. Well, I can see that on the back of the one that Tom
4 gave me, yes.

5 Q. Who is --

6 A. Tom Staddon, that I wrote the tonnages down, yes.

7 Q. And I understand that you're not a lawyer, you're not
8 going to sit here and read 30-some paragraphs of terms and
9 conditions, but you're generally aware that they're on the
10 back of purchase orders, correct?

11 A. Yes.

12 Q. Real quick, Exhibit 501, Heidtman's first exhibit, the
13 email from Tom Staddon to you says, Bob, let's try this one.
14 It will be tricky. That's the product at issue here, right?
15 It started out at .065, we went through that whole thing
16 this morning. But what did that mean, it will be tricky?

17 A. I can't answer for him. I don't know what he means on
18 that.

19 Q. Do you recall having discussions with Mr. Staddon of
20 Fabco that this was a special product and it was going to be
21 a little bit difficult to produce and that they were not
22 able to get it from U.S. Steel and some of their other major
23 suppliers?

24 A. No, he didn't say that to me, no.

25 Q. You just don't remember what it will be tricky means in

11/29/04

Witness: Robert Millar

1 the context of this email?

2 A. No, I don't.

3 Q. Okay. On 508, sir, you got your note here in the bottom
4 right-hand corner, and the, it says is this -- looks like a
5 sticky was put over, or some kind of note. Is that your
6 handwriting, sir?

7 A. No, it's not.

8 Q. Do you know whose that is?

9 A. Yeah, I believe that is our inside salesperson.

10 Q. It says --

11 A. Yeah, it's Trish, yeah.

12 Q. You know Trish?

13 A. Yes.

14 Q. It says, Per Bob M, conversation with Tom Staddon,
15 September 25, '03, this PO blanket will not start until
16 September 2004. That was your understanding also?

17 A. Oh, yes, yes.

18 Q. Okay. Think that this thing wasn't actually going into
19 production until summer of '04?

20 A. That's correct.

21 Q. And all these PO's going back 15 months or so, or
22 before, spring of '03, the total type, and the engineering
23 parts, onesies and twosies, you send out to be tested?

24 A. Well, I supplied the material a year before for them
25 to --

11/29/04

Witness: Robert Millar

1 Q. Well, sure, but it wasn't weekly huge shipments, it was
2 testing parts.

3 A. That was the original coils I sent them, yes.

4 Q. Okay. Like you, on 511, this is the letter you sent to
5 Mr. Staddon in January of '04, and I saw a lot of these
6 letters in January of '04. They're almost all worded the
7 same going back and forth. Due to these increasing steel
8 prices, we've walked through surcharges. I notice that the
9 surcharge acceptance form is not attached. See the second
10 to last line there of the letter? It says, Tom, I am
11 sending along a surcharge acceptance form.

12 A. Yes.

13 Q. It's not attached to 511, but originally when you sent
14 this letter there was some kind of form with it, correct?

15 A. That's correct.

16 Q. But Mr. Staddon, nobody from Fabco ever executed that or
17 returned it, did they?

18 A. To the best of my knowledge, no.

19 Q. And then to flip to 513, a couple weeks later,
20 January 27, again you say -- actually this letter is to
21 Tessier, who says, hey, we think it's imperative that you
22 respond by signing the surcharge form. So you reminded them
23 a couple weeks later, we need the surcharge form signed.
24 And still same thing, they didn't return it, correct?

25 A. That's correct, to the best of my knowledge.

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Witness: Robert Millar

1 Q. Why did you want them to sign this form and get it back
2 to you?

3 A. Just as a course of having it in the file.

4 Q. And they never did?

5 A. No.

6 Q. On Exhibit 529, sir, you testified this is about some
7 parts that aren't in this case, but the 193 and 153.

8 A. Yes.

9 Q. Didn't Mr. Staddon tell you that the reason, and I know
10 this is a curt, terse email, but didn't he say the reason
11 they're terminating those two products is because Heidtman
12 wanted a half million dollars in increase, and Nissan agreed
13 to put it in their CSP steel buy?

14 A. No.

15 Q. No? What happened?

16 A. They were going into Nissan CSP program.

17 Q. Well, it says, Please be advised that materials have
18 gone into the Nissan CSP program. You know --

19 A. It's an off-load program.

20 Q. It's a steel purchase program, right?

21 A. Yes, best of my knowledge, yes.

22 Q. I called it group steel buy. Used wrong term maybe.

23 A. Okay.

24 Q. And you said on 532, you said okay, here's the July 19,
25 '04, and it's the first time we have a new PO with the April

1 price, and in fact you had asked for that .3585, and I
2 understand you wanted a surcharge, too, back in March. You
3 went through that with your lawyer.

4 A. Uh-huh.

5 Q. Fabco actually gave you the price, but not the price,
6 right, and that was the problem? In other words, they
7 issued a new PO but for the .3585, but --

8 A. No, I had, they had put down .3585. When I had sent
9 them the pricing for 2005, that they had asked me the
10 estimated pricing, I said that the price was going to be,
11 our best guess, it would be a .3585 plus applicable
12 surcharge. That's what I said.

13 Q. You're right. Exactly what your email says, March 1
14 email. That's what it says, that's the price you were
15 asking for, but you wanted the surcharge, too, right?

16 A. That is correct, yes.

17 Q. .3585?

18 A. Yes.

19 Q. And Fabco had this .297, and they gave you whatever
20 increase to .3585 but they didn't give you the surcharge,
21 right?

22 A. No, they did not, no.

23 Q. Now, on 532, this is the thing we've been over ten times
24 so I'll keep this real quick, this is the July 19, 2004 PO.
25 And this is the first dated PO we have with the new price of

1 .3585, which is what you'd asked for back in March,
2 understanding that you asked for the surcharge and they
3 didn't give it to you.

4 A. I didn't ask for that. I said the current price is
5 estimated to be .3585 plus applicable surcharge.

6 Q. Right.

7 A. That's what we feel the price is going to be for 2005.

8 Q. 2005, okay.

9 A. You know, to start.

10 Q. But in 532, I thought I just heard you testify, and I
11 might be wrong, that you got this PO, which is 532, and you
12 send it back to Tom Staddon, see at the top there, Attention
13 Tom Staddon?

14 A. Yes.

15 Q. Per email 6/24/04, July 2004 price is 47.85.

16 A. Right.

17 Q. Hundred weight?

18 A. Right.

19 Q. And I thought I heard you testify that you didn't get a
20 response, is that right?

21 A. Best of my knowledge that I remember, I did not, no.

22 Q. And I'm not playing gotcha here because I understand you
23 got a lot of customers and a lot of things flying around,
24 and you're going a hundred miles an hour, but just flipping
25 back one exhibit to 531, do you see in the middle of the

1 page where four days later on Monday, June 28, Tom Staddon
2 of Fabco tells you, hey, Bob, please be advised Fabco is not
3 accepting price increases at this time?

4 A. No, it's not 531.

5 Q. 530, I'm sorry, go back to 530. Do you remember getting
6 that email, sir?

7 A. Yes.

8 Q. So Fabco did in fact tell you, you sent this thing on a
9 Thursday, June 24, following Monday Fabco tells you no,
10 we're not paying them, didn't they?

11 A. Let me just see here. Yeah, I sent him an email and he
12 responded back, Please be advised that --

13 Q. Yeah, same day you sent him an email, Thursday June 24,
14 you also sent this little note. Looks like you did both.
15 But your note is dated, your handwritten note is dated
16 June 24, email dated June 24, they both have 47.85, correct?

17 A. Yes.

18 Q. And then four days later, Friday, Saturday, Sunday,
19 Monday, Tom at Fabco says no, correct?

20 THE COURT: I'm sorry, where do you see the
21 June 24 date on Exhibit 532?

22 MR. SHARKEY: Very right lower corner, says per
23 email, 6/24/04.

24 THE WITNESS: That's June 24th.

25 MR. SHARKEY: Yeah, right.

11/29/04

Witness: Robert Millar

1 THE COURT: But we don't know --

2 THE WITNESS: But --

3 THE COURT: Just a minute.

4 THE WITNESS: But I'm telling him down below,
5 Tom put our phone conversation, here are your July steel
6 prices.

7 BY MR. SHARKEY:

8 Q. Yes, sir, and my only point is that they timely told you
9 no, the following Monday, and you remember getting this
10 email that's in the middle of Exhibit 530.

11 A. Yes.

12 Q. Okay. Did you ever ask -- you say your supplier is
13 Steel Dynamics, Inc?

14 A. Steel Dynamics, yes.

15 Q. Steel Dynamics. Did you ever ask them, hey, I'd like a
16 long-term fixed price contract?

17 A. Not to my knowledge, no.

18 Q. And you testified that they, meaning Steel Dynamics
19 Inc., passed along a surcharge to you.

20 A. Yes.

21 Q. And you testified that that came from the mill and the
22 mill is --

23 A. Steel Dynamics, yes.

24 Q. But isn't Heidtman the single largest shareholder of
25 Steel Dynamics, Inc?

1 A. I can't answer that. I don't think we are, but I'd only
2 be guessing.

3 Q. Have you told either Tom Staddon or Jeff Tessier at
4 Fabco that Heidtman is the principal shareholder of Steel
5 Dynamics, Inc?

6 A. I have not told him that, no. I've told him we have an
7 equity position in Steel Dynamics.

8 Q. Have you told Jeff Tessier or Tom Staddon that not only
9 does Heidtman want to break even but this 51 cents, they
10 actually want to make a profit on the steel?

11 A. My boss relayed that to --

12 Q. Thank you. No further questions. Your Honor.

13 (3:15 p.m.)

14 **REDIRECT EXAMINATION**

15 BY MR. BOHMER:

16 Q. Do you recall this morning that Mr. Tessier testified
17 that any purchase order saying December 31, 2039, that was
18 fixed by some internal computer?

19 A. Yes. I was told the same thing within the last couple
20 of years, and I don't remember when it was.

21 Q. You were told that they just spit out that date?

22 A. Yes.

23 Q. Did you hear Mr. Tessier say this morning that they had
24 some information technology person fix that or change that?

25 A. I heard that, yes.

1 Q. Did you also hear Mr. Tessier say that when a change was
2 made to the face of a purchase order that it would show what
3 was changed in the body of the purchase order?

4 A. Yes, I did.

5 Q. At any time that you received purchase orders -- this
6 particular series of purchase orders, any of them, did you
7 ever see in the body of any of those purchase orders a
8 notation that the date was being changed from 12/31/39 to
9 9/25/06?

10 A. No, I did not.

11 MR. BOHMER: No further questions.

12 THE COURT: All right. You may step down.

13 Thank you.

14 (Witness excused 3:17 p.m.)

15 THE COURT: Let's recess for 15 minutes or so.

16 (Recess taken.)

17 MR. BOHMER: Your Honor, the defendant would
18 call Mark Ridenour.

19 MR. SHARKEY: Let the record reflect Mr. Mathis
20 stepped across the street to cover a 3:30 for me.

21 THE COURT: This is taking a lot longer than you
22 guys said it would.

23 MR. BOHMER: It is, Your Honor.

24

25 **MARK RIDENOUR,**

hereinbefore called as a witness, being first duly sworn
by the Court to tell the truth, the whole truth, and
nothing but the truth, was examined and testified upon
his oath as follows:

(3:37 p.m.)

DIRECT EXAMINATION

BY MR. BOHMER:

Q. Mr. Ridenour, sitting here today, are you employed?

A. Yes, I am.

Q. And where are you employed?

A. Heidtman Steel.

Q. And what is your position?

A. Chief financial officer.

Q. And can you briefly describe your duties as chief financial officer?

A. All financial, accounting, credit, and MIS duties fall under my title.

Q. Again, I don't want it to be a long answer, but what types of things does Heidtman do for customers?

A. Heidtman Steel is basically a steel service center that's really a distributor. We buy steel from mill sources, we do something to it in terms of processing, such as pickling, slitting, galvanizing, cut to length, temper passing, and then ship it on to the customer.

Q. Does Heidtman make any steel?

1 A. No, sir.

2 Q. In the world of the purchasing and sales of steel, are
3 there multiple gauges or thickness of steel, and widths, or
4 is there just one kind of steel?

5 A. No, it's basically infinite.

6 Q. The material that we're primarily talking about today is
7 called 063. Do you understand that to be the case?

8 A. Yes.

9 Q. Can you describe what 063 material is to the best of
10 your ability?

11 A. It's "of an inch," so it's relatively thin steel.

12 Q. Is this a new type of steel, to the best of your
13 knowledge?

14 A. No, sir.

15 Q. Is there anything special or unique about it?

16 A. No, it's high strength, but high strength is not that
17 new.

18 Q. And are you aware that this material that we're talking
19 about today was purchased from Steel Dynamics?

20 A. Yes, I am.

21 Q. Are you aware of anyplace elsewhere this material can be
22 acquired?

23 A. Yes, we think that Newcore(sp) Berkley makes it, or can
24 make it, and then there are a couple of foreign sources, as
25 well.

1 Q. And Steel Dynamics, does it sell to just Heidtman, or
2 other companies as well?

3 A. It sells to all kinds of customers.

4 Q. Including competitors of yours?

5 A. Unfortunately, yes.

6 Q. When did you first learn that there may be issues of
7 some type or form between Fabco and Heidtman?

8 A. Well, when we got served the lawsuit, obviously, that
9 was the red flag, which then causes me to, you know, go and
10 start poking around, what's going on, and in looking at the
11 account, just the accounts receivable account, there were
12 some deducts which we call charge backs in our system
13 whereby they deduct from a check that they send us. I
14 didn't know at the time exactly what that was, but that does
15 tend to make you believe there's a problem somewhere.

16 Q. Can you explain what you found in addition to, if
17 anything, in addition to deducts when you looked at the
18 account for Fabco?

19 A. Well, up to that point, looked like the account was
20 pretty clean. I didn't see a lot that was late, or anything
21 of that matter. If there were other problems or other
22 deducts, it would show up, because you just don't clear
23 those types of things off the accounting system that
24 quickly. So everything appeared to be in order until, you
25 know, right at the top of the list you see these deducts

1 from checks, and sometimes I can't tell by looking at that,
2 it could be a reject or some other deduct. We now know that
3 it was some other deduct.

4 Q. Looking at the historical -- well, let me ask this, did
5 you look historically at how Fabco had been paying?

6 A. It appeared everything was fine. I didn't go back in
7 history a long time, but there might have been a deduct here
8 or there that got cleaned up. You never know what those
9 are, but it didn't appear that this was a problem account.

10 Q. Looking back at the historical data, can you put a
11 ballpark on where every invoice Heidtman had paid that was
12 due and payable had been paid in full?

13 A. I went back about a month, and everything appeared to be
14 in order, so that would be more or less at the end of
15 August, first part of September, probably, looking back 30
16 days in our system, but I didn't see any problems.

17 Q. Would it be a fair characterization to say that the
18 account was current as of that time?

19 A. Yes, it would be.

20 Q. Do you remember what the terms were for Fabco's payment
21 of Heidtman invoices?

22 A. Net 30.

23 Q. When you were here for the temporary restraining order
24 hearing, did you look that day at the status of Fabco's
25 payment on the net 30 terms?

1 A. Yes, I did.

2 Q. And what was it?

3 A. They were over 30 days by some 37, \$38,000.

4 Q. And you were here in the courtroom when Fabco was
5 ordered to pay outstanding invoices, with some caveats to be
6 sure, but they were to pay something?

7 A. Correct.

8 Q. Did they?

9 A. Yes, they did, and with deducts.

10 Q. So do you recall approximately what the check was or
11 checks that Heidtman received?

12 A. It's about \$31,000, give or take, what we received.

13 Q. And how much was the invoice?

14 A. 37, 38.

15 Q. So they deducted what they didn't want to pay?

16 A. That appears to be the case.

17 Q. Have you had occasion to look at the, if I use the term
18 trial balance, what does that mean to you?

19 A. That would be out of the accounting system, just a
20 literal history of what's still open in the account.

21 Q. Okay. Have you had occasion recently to look at the
22 Fabco trial balance within the Heidtman computer system?

23 A. Yes, I looked this morning.

24 Q. And what did you find?

25 A. We still have invoices over, actually over 45 days now.

1 I don't have the last couple of days receipts in there but
2 it's far over 30, to the tune of some 60-some thousand
3 dollars.

4 Q. Okay.

5 THE COURT: Is it fair to say that that amount
6 represents the difference between what Fabco thinks it is
7 obligated to pay under the contract and what Heidtman
8 believes that it is entitled to charge because of the
9 invoices that it sent?

10 THE WITNESS: No, ma'am. What they are is we
11 have a total invoice price on an invoice. That would be the
12 base price plus the surcharge that's been talked about. It
13 appears what they're doing is deducting the surcharge.

14 THE COURT: Right, because they don't think
15 they're required to pay it under the contract.

16 THE WITNESS: But when I look at the 60-some
17 thousand dollars, that represents base price plus surcharge.
18 The surcharge is six, seven dollars compared to, you know,
19 35 a ton for --

20 THE COURT: Haven't they paid you the point,
21 what is it, 3585 per hundred weight, I don't know, is it per
22 pound?

23 THE WITNESS: It goes both ways.

24 THE COURT: Okay.

25 THE WITNESS: Not within 30 days. That's I

1 think the point. We have three or four invoices, they're 20
2 to 30,000 apiece that have not been touched, nothing has
3 been paid on them.

4 BY MR. BOHMER:

5 Q. And again you checked this when?

6 A. This morning.

7 Q. Just to make sure it's perfectly clear, these invoices
8 that are now over 45 days old and unpaid as of this morning,
9 you heard this morning that it was described by Mr. Tessier
10 as part of the dispute or it was those are the overcharges.

11 I just want to make it clear, does that explain the 60-plus
12 thousand dollars that is over 45 days on net 30 terms today?

13 A. No, it does not.

14 Q. So that would include charges at the 35.80?

15 A. That is correct. Nothing on these invoices have been
16 paid.

17 Q. You're aware -- are you aware that some invoices have
18 not been paid in full?

19 A. Yes, I am.

20 Q. Okay. And sitting in front of you, I've left a couple
21 of exhibits, being Exhibits 543, 544, 545 and 546, and just
22 so we have it in the record, can you state what these are,
23 can you state what I've left you?

24 A. Yes. 543 is a series of invoices that we would have
25 sent Thyssen for shipments, and we invoice per shipment, and

1 545 are what we call charge backs, and a charge back would
2 be if we receive what we call a short pay on the check, this
3 is our write-up, so that we can get the payment into the
4 system. But it creates a charge back, as well, to be
5 cleared, and Exhibit 546 is just the period end receipts
6 journal.

7 Q. I don't want to take the length of time it would take to
8 go through these in detail, so if I can ask a couple more
9 general questions and put an end to this line, that would
10 probably be best. Exhibit 543, this series of invoices, is
11 it your understanding that these are invoices that were or
12 were not paid in all or part?

13 A. Well, without going through all of them, what happens is
14 that when they, one of these invoices or some of these
15 invoices were short paid, that's when a charge back is
16 created for that.

17 Q. Okay. And if I were to go through here, you indicated
18 earlier that sometime late August, early September, Fabco
19 had paid current.

20 A. Correct.

21 Q. And that includes any charge backs or surcharges.

22 A. There were no unclear charge backs in the system.

23 Q. Okay. So whatever was invoiced and that was due and
24 payable as of that date had been taken care of.

25 A. That's what it looks like to me.

1 Q. Just before we took that brief break, recess, a question
2 was asked of Mr. Millar regarding the ownership of Steel
3 Dynamics. Do you recall that?

4 A. Yes, sir.

5 Q. What stake, if any, does Heidtman have in Steel
6 Dynamics?

7 A. Heidtman Steel has approximately five percent of the
8 outstanding public shares of Steel Dynamics.

9 Q. Is Steel Dynamics a publicly traded company?

10 A. Yes, it is.

11 Q. Does Heidtman Steel to your knowledge have control of
12 the board of directors?

13 A. No, it does not.

14 Q. Does Heidtman Steel have any control over the
15 management?

16 A. No, it does not.

17 Q. Can you characterize the relationship between Steel
18 Dynamics and Heidtman Steel?

19 A. Sure. We were one of the original founding partners.
20 We had other investors, as well. It wasn't just Heidtman.
21 The company went public about six, seven years ago, and like
22 I said, we own about five percent of the company, and it's
23 held as an equity investment, and we have a client next door
24 to them so we have a supplier-vendor relationship, and we
25 obviously know them but we in no way control them.

1 Q. And when they make steel, they can ship it to any other
2 supplier, as well?

3 A. And they do.

4 MR. BOHMER: No further questions at this time,
5 Your Honor.

6 (3:49 p.m.)

7 **CROSS EXAMINATION**

8 BY MR. SHARKEY:

9 Q. Good afternoon, Mr. Ridenour.

10 A. Good afternoon.

11 Q. You said Fabco's a pretty good customer until end of
12 August or so, that's when they started getting behind?

13 A. No, I did not say that.

14 Q. What did you say?

15 A. I said at the end of August, appears everything was paid
16 up. There was no outstanding.

17 Q. September they started getting behind?

18 A. It was either toward the end of September, sometime in
19 October.

20 Q. Do you know when volume production started on the part
21 we're talking about today?

22 A. No, I do not.

23 Q. August sound about right?

24 A. I have no idea.

25 Q. Your counsel just asked you about Exhibit 545 there, and

1 I was hoping in my opening to avoid all this, but --

2 THE COURT: Please do.

3 BY MR. SHARKEY:

4 Q. I'm going to follow up on the judge's question, and she
5 asked you -- I don't even want to call Mr. Boyce to the
6 stand. I want to avoid this and just keep this streamlined.
7 Is your testimony -- I understand you're saying that Fabco
8 hasn't paid Heidtman everything that Heidtman has invoiced
9 to Fabco. So stipulated, okay. But the question is has
10 Fabco paid what is owed to Heidtman for what's been shipped
11 times .3585?

12 A. I'd have to look through that and tell you, but what I'm
13 saying is, and to the judge's question is we have whole
14 invoices that are unpaid over 30 days. That means that
15 nothing has been paid on that.

16 Q. 60 some thousand dollars, 45 days out?

17 A. That's correct.

18 THE COURT: Well, but that's not really, I mean,
19 depending how you really account for that, that's not really
20 responsive to the question, because if you've got an invoice
21 for \$50,000, and Fabco pays \$35,000 on it because they don't
22 think they're required to pay that last 15,000, and then you
23 have another shipment and another 15,000 invoice, or \$50,000
24 invoice, and Fabco pays 35 again. If you take the first 15
25 of that 35 and apply it to the last invoice, okay, now

1 you've got only 20 paid on the 50,000 invoice and you're
2 going to say, well, no, they didn't pay the full --

3 THE WITNESS: Oh, I --

4 THE COURT: Yeah, so every time you get a check,
5 if you're putting it toward the first invoice, then of
6 course you're going to have some at the end that don't look
7 like they have anything paid on them at all. Is that what's
8 happened here?

9 THE WITNESS: No, we don't do balance
10 accounting. So that's where I explained where you have a
11 charge back. If you had a \$50,000 invoice, to use your
12 example, and they paid 35 on it, we would post 35 against
13 that invoice and then we create a charge back for 15,000
14 that would have to be accounted for and cleared later.

15 THE COURT: And what happens with the
16 next \$50,000 invoice when the next \$35,000 payment comes in?

17 THE WITNESS: Same thing. We post the 35
18 against what they said they wanted to pay for it, and create
19 a charge back.

20 BY MR. SHARKEY:

21 Q. I had a conversation with your lawyer last week, and he
22 gave me four invoices that were about 21, 22 range. Was
23 that based on a conversation with you?

24 A. Those are the invoices we're talking about.

25 Q. Those are the four we're talking about, okay.

1 Does your system, which you checked this morning,
2 and today is Monday, I assume -- when is it current through,
3 Tuesday, Wednesday last week?

4 A. Should have been through Wednesday. I said we haven't
5 accounted for anything we received over the last couple
6 days.

7 Q. Understood. Did you get a check -- I'm just going to
8 tell you right now, I told my guy, I don't want you paying
9 what's current, I want you to be ahead when we get to this
10 court today. That's what he's going to say when he gets up
11 here.

12 A. That may be.

13 Q. What do you mean that it may be?

14 A. If it's in the mail. I don't have it.

15 Q. I'm sorry, I'm arguing with you a little bit here. What
16 he's going to say on the stand, what he told me last Monday,
17 a week ago today, I overnighted, we didn't pay the full 85
18 you guys were asking for, but whatever the 3585 works out to
19 be, and I don't know what that number works out to be, but
20 did you get that check?

21 A. No, it's not in the system. If it's sitting there in
22 our office today, I do not know that.

23 Q. I understand, and you just pull up a screen and you
24 can't account for every piece of paper Heidtman receives.

25 A. 7:00 this morning.

1 Q. You're not aware of getting a check for 60-some thousand
2 dollars overnighted? You would have received it six days
3 ago last Tuesday.

4 A. No, I'm not.

5 Q. And those, what my guy is telling me, and I keep looking
6 backwards here, but Mr. Boyce, CFO of Fabco, is telling me
7 those are not even due until tomorrow, the 30th, is that
8 right?

9 A. No, I wouldn't believe so, or they wouldn't be 45 days.

10 Q. But at worst, according to your computer this morning,
11 when you checked it at 7:00 before we drove up here, we were
12 60-some thousand out.

13 A. 60, 70, those invoices in question.

14 Q. And it wasn't until you got the lawsuit that you went
15 and looked at all this and the red flags went up for you.

16 A. That's correct.

17 MR. SHARKEY: I have nothing further, Your
18 Honor.

19 MR. BOHMER: No further questions, Your Honor.

20 THE COURT: Thank you, Mr. Ridenour.

21 (Witness excused 3:55 p.m.)

22 MR. BOHMER: No further questions.

23 MR. SHARKEY: It's five to 4:00. I can call
24 Mr. Boyce to ask him about the current state of the account.

25 THE COURT: I don't think that the current state

1 of the account is really all that critical here. I asked
2 you to pay it, ordered you to pay it.

3 MR. SHARKEY: And we did.

4 THE COURT: I assume you did.

5 MR. SHARKEY: What you said -- I just got the
6 transcript. I don't remember this exchange, but they said,
7 hey, you're 30 some behind, and I said I don't know exactly
8 what we're behind, and I said no matter what, I promise
9 we'll pay at least 30,000 to them by the end of the week.
10 Mr. Ridenour handed me something after the hearing I think
11 that was you said you actually owe us 37, I said fine. I
12 handed it to Mr. Boyce, he says no, we actually owe him 31.
13 So here we are back to this difference. So we paid them 31
14 that Friday, and what Mr. Boyce would say, if the Court
15 would like to hear, is last Monday, he's going to say none
16 of these are due until tomorrow, the end of the month, but
17 they just override them just to remove the issue.

18 THE COURT: I don't understand how, if they were
19 overnighted, presumably Federal Express, they should have
20 got there Tuesday, they certainly should be in the system.
21 I know Thanksgiving was not a mail day.

22 MR. SHARKEY: My secretary took Wednesday off
23 and I didn't get my faxes on Wednesday. People take the day
24 off.

25 THE COURT: What about Friday and Saturday?

1 There's mail.

2 MR. SHARKEY: I'm just saying, I'm not making
3 excuses for the other side. I'm just saying the reality is
4 sometimes the holiday week, things don't happen the way they
5 should.

6 THE COURT: All right.

7 MR. SHARKEY: So I just want to be clear, if the
8 Court wants to hear from Mr. Boyce, the CFO, I'll make a
9 proffer. If you won't accept that, I'll --

10 THE COURT: I'll accept the proffer. As I said
11 I don't think this preliminary injunction hearing rests on
12 that anyway.

13 MR. SHARKEY: Yes, ma'am. We have nothing on
14 rebuttal anyway.

15 THE COURT: I suppose you want me to do
16 something today, right?

17 MR. SHARKEY: Well, I am sympathetic to the
18 Court and its law clerk because you can't crank out a long
19 order --

20 THE COURT: That's true.

21 MR. SHARKEY: I understand. But we need this,
22 we need the parts, and if the Court wants to take two weeks
23 to issue a lengthy ruling, then we would just ask the TRO be
24 extended ten more days. If the Court, you know, you're the
25 Court. Do what you want. I'm just saying we do need

1 something done today, yes, ma'am.

2 THE COURT: Here's what I'm going to do. I will
3 tell you that my preliminary thought on this is that Fabco
4 is correct, that it has a long-term contract with a fixed
5 price and that Heidtman is the one who bore the risk of the
6 price going up. I mean, I have a lot of analysis to do with
7 respect to these invoices, but it certainly looks to me like
8 this was a fixed price contract that Fabco agreed to pay a
9 surcharge on out of the, I'm not going to say out of the
10 goodness of its heart, but out of its best business judgment
11 until they felt they had been squeezed as far as they could
12 be squeezed. And I am not at all impressed by this argument
13 that their payments, their agreement to pay as their arm was
14 getting twisted in the summer and early fall constitutes any
15 kind of waiver of their right under the contract. I just
16 don't see it that way. So that's my preliminary thought
17 about this.

18 I'm going to continue the TRO for an additional
19 20 days while I work on an opinion and order, and if I
20 change my mind as I go through my exhibits and notes, I'll
21 let you know, but that's my thought at the time.

22 And that, of course, that TRO of course is
23 contingent on Fabco continuing to pay at the original
24 invoice price of .3585 net 30. Okay. Thank you.

25 (Proceedings concluded 4:00 p.m.)

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CERTIFICATE OF COURT REPORTER

I certify that the foregoing is a correct transcript
from reported proceedings in the above-entitled matter.

SUZANNE JACQUES, CSR, RMR
Official Court Reporter
Eastern District of Michigan

Date